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No. - .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

RICHARD REPOZA,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented.

I. Whether the Supreme Judicial Court's failure to apply a harmless error analysis to this case solely because the defendant did not affirmatively concede the issue of intent conflicts with this Court's decision in *Rose* v. *Clark* and the decisions of lower federal and state courts following *Rose*.

II. Whether the Supreme Judicial Court misinterpreted *Francis* v. *Franklin* and established a new standard of review for jury instructions at odds with this Court's previous rulings.

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In the
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COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

RICHARD REPOZA,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Opinion Below.

The opinion of the court below is reported at 400 Mass. 516, 510 N.E.2d 755 (1987), which is reproduced here as Appendix A, page 1a.

Jurisdiction.

The decision of the court below was entered on July 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Involved.

FOURTEENTH AMENDMENT.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

On July 3, 1978, Respondent Richard Repoza ("Repoza") was indicted by a Middlesex County Grand Jury in the Commonwealth of Massachusetts for murder in the first degree.

After trial by jury, Repoza was found guilty of murder in the second degree and sentenced to life imprisonment. On direct appeal, the Massachusetts Supreme Judicial Court affirmed the conviction, holding in part that allegedly burden-shifting language in the trial judge's instructions to the jury were vitiated by other, correct language in the charge. *Com-*

monwealth v. *Repoza* (*Repoza I*), 382 Mass. 119, 414 N.E.2d 591 (1980) (Appendix B, 9a).

Repoza filed a motion for new trial on August 17, 1984. The motion was denied by a Justice of the Superior Court on September 17, 1984. Repoza appealed the denial of his motion to the Massachusetts Appeals Court which affirmed the order of the Superior Court on July 14, 1986. The Supreme Judicial Court granted Repoza's application for further appellate review and, on July 23, 1987, reversed the order of the Superior Court and granted Repoza a new trial, holding that this Court's opinion in *Francis* v. *Franklin*, 471 U.S. 307 (1985) required that result. *Commonwealth* v. *Repoza* (*Repoza II*), 400 Mass. 516, 510 N.E.2d 755 (1987).

Statement of Facts.

The facts surrounding the homicide for which the respondent was indicted are set out in the opinion of the Supreme Judicial Court in *Repoza I* (Appendix B, 9a-26a). The Commonwealth of Massachusetts ("the Commonwealth") will limit its reiteration to the facts concerning Repoza's trial.

At trial, Repoza claimed that the Commonwealth had accused the wrong person. His trial attorney cross-examined the Commonwealth's witnesses to expose any inconsistencies and, in addition, called several witnesses who claimed that they saw a person other than Repoza with a knife but that they had not seen Repoza with a knife.

In line with Repoza's decision to cast suspicion on others and to deny either having a knife or being present at the scene of the stabbing, defense counsel stated in his opening remarks to the jury:

> [A] young boy was killed, and everyone is sorry for that . . . The defense [will] prove to you that not

> only could it not have been Repoza, that it was almost an impossibility it was him.

In closing argument, defense counsel stated to like effect:

> There is no way that Richard Repoza could have been at the spot where John Grogan became a victim . . . No. Repoza wasn't there. He wasn't at that spot at that time.

In his instructions to the jury, the trial judge twice stated malice could be presumed from the intentional use of a deadly weapon in a homicide.

Although the Assistant District Attorney tried to convince the judge to correct the charge by substituting the term "inference" for "presumption", the trial judge declined to do so. The defendant's attorney agreed with the judge's description of the law (*Repoza I*, Appendix B, 25a).

Of the conflicting versions of the events described by the witnesses for the prosecution and Repoza, the jury chose to believe that Repoza was the individual responsible for the victim's death, and returned a verdict finding Repoza guilty of murder in the second degree.

Argument.

I. THE FAILURE OF THE SUPREME JUDICIAL COURT TO APPLY A HARMLESS ERROR ANALYSIS TO THIS CASE SOLELY BECAUSE THE DEFENDANT DID NOT AFFIRMATIVELY CONCEDE THE ISSUE OF INTENT CONFLICTS WITH THE DECISION OF THIS COURT IN *Rose* V. *Clark* AND THE DECISIONS OF LOWER FEDERAL AND STATE COURTS FOLLOWING *Rose*.

The decision of the Supreme Judicial Court contained the following language:

> [U]nder our statute there is always an element of intent for the jury to determine in murder cases in which the defendant does not concede that a conviction of murder in the first or second degree would be warranted if the proper person were prosecuted. . . . At no point at either the trial or the direct appeal did the defendant concede that a murder, and not a manslaughter, had occurred. Thus, intent was a live issue and the error cannot be considered to be harmless beyond a reasonable doubt.

Commonwealth v. *Repoza*, 400 Mass. 516, 522 n.7, 510 N.E.2d 755, 758 n.7 (1987) (citations omitted) (Appendix A, 7a). Having stated this principle, the Supreme Judicial Court concluded that the rule in *Francis* v. *Franklin*, 471 U.S. 307 (1985) required the reversal of Repoza's conviction.

The barrier to harmless error analysis put in place by the Supreme Judicial Court is essentially identical to that imposed by the Sixth Circuit Court of Appeals in *Engle* v. *Koehler*, 707 F.2d 241 (6th Cir. 1983), *aff'd*, 466 U.S. 1 (1984) (per curiam) and applied in *Clark* v. *Rose*, 611 F. Supp. 294 (D. Tenn. 1983), *aff'd*, 762 F.2d 1006 (6th Cir. 1985), *reversed*, 106 S.Ct. 3101 (1986).

In *Engle*, the Court of Appeals stated:

> If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea*, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial.

Engle v. *Koehler*, 707 F.2d at 246.

This test was rejected in *Rose* v. *Clark*, 106 S.Ct. 3101 (1986) which was decided a full year before the opinion of the Supreme Judicial Court in this case. In *Rose*, this Court stated, "our harmless error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that '*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.'" *Id.* at 3109 (citations omitted).

By holding that a *Sandstrom* error cannot be considered harmless unless a defendant in a murder case affirmatively concedes intent as an issue, the Supreme Judicial Court is in direct conflict with this Court and lower courts which have decided similar cases in the wake of *Rose* v. *Clark*, 106 S.Ct. 3101 (1986). See, e.g., *Matarese* v. *Le Fevre*, 801 F.2d 98 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1353 (1987)); *Bates* v. *Blackburn*, 805 F.2d 569 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 3190 (1987); *Merlo* v. *Bolden*, 801 F.2d 252 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1358 (1987); *Herd* v. *Kincheloe*, 800 F.2d 1526 (9th Cir. 1986); *McKenzie* v. *Risley*, 801 F.2d 1519 (9th Cir. 1986); *Myrick* v. *Maschner*, 799 F.2d 642 (10th Cir. 1986); *Potts* v. *Kemp*, 814 F.2d 1512 (11th Cir. 1987); *State* v. *Perez*, 10 Conn. App. 279, 523 A.2d 508, *cert. denied*, 203 Conn. 810, 525 A.2d 524 (1987).

The failure of the Supreme Judicial Court to consider this case in light of the rule in *Rose* v. *Clark*, 106 S.Ct. 3101 (1986) is particularly noteworthy because Repoza never contested the issue of intent at trial. Rather, he claimed that someone other than he was responsible for the crime. At trial, the opening statement of defense counsel, his cross-examination of the Commonwealth's witnesses, the testimony of Repoza's witnesses and counsel's closing argument all were directed toward the alleged misidentification of Repoza. Throughout the trial, the defense pressed its contention that Repoza had no knife, could not have been carrying one, and was not near the victim at anytime.

No argument was made that Repoza was acting in self-defense or in the heat of passion. No instruction on self-defense was requested or given. Rather, counsel for Repoza argued for outright acquittal.[1] The facts of the case are in stark contrast to those in *Rose* v. *Clark*, 106 S.Ct. 3101 (1986), where the defendant, who could not seriously contest identification, alleged amnesia, drunkenness and insanity as factors negating criminal responsibility. The Supreme Judicial Court's decision is in confict both with this Court's decison and decisions of lower federal and state courts. The Commonwealth of Massachusetts is entitled to a review of this case which will consist of an examination of "the entire record to determine whether the instruction which theoretically *could* have altered the verdict of the jury actually had such effect as a practical reality." *Myrick* v. *Maschner*, 799 F.2d 642, 645 (10th Cir. 1986) (emphasis in original).

II. The Supreme Judicial Court Misinterpreted *Francis* v. *Franklin* by Holding That *Francis* Established a Stricter Standard of Review Than That Set Forth in *Cupp* v. *Naughton* and *Sandstrom* v. *Montana*.

In *Commonwealth* v. *Repoza* (*Repoza II*), 400 Mass. 516, 510 N.E.2d 755 (1987), the Supreme Judicial Court of Massachusetts held that a judge's charge on malice in a murder indictment impermissibly shifted the burden of negating that element to the defendant, thereby violating *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). However, in *Commonwealth* v. *Repoza* (*Repoza I*), 382 Mass. 199, 414 N.E.2d 591 (1980),

[1] On direct appeal, Repoza did not raise the issue of a *Sandstrom* error in the charge. Rather, the Supreme Judicial Court reviewed the issue on its own intitative. *Commonwealth* v. *Repoza* (*Repoza I*), 382 Mass. 119, 494 N.E.2d 591 (1980) (Appendix B, 22a).

the Supreme Judicial Court concluded that the same instructions passed constitutional muster because, "the judge's erroneous equating of malice implied or inferred to malice presumed was ultimately vitiated by his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth." *Repoza I*, 382 Mass. at 134, 414 N.E.2d at 600. The Supreme Judicial Court added that "the instructions on the nature of malice aforethought, which came after the judge's erroneous use of the word 'presumption,' were sufficient to dispel any misconception that might have been created by the error." *Id.* In reaching this conclusion in *Repoza I*, the Supreme Judicial Court followed the admonition of *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979) that the question in such cases is whether the charge, "read as a whole, makes clear the Commonwealth's burden." *Commonwealth* v. *Repoza* (*Repoza I*), 382 Mass. at 134, 414 N.E.2d at 600.

The sole intervening circumstance which can explain the opposite conclusions of *Repoza I* and *Repoza II* is the opinion of this Court in *Francis* v. *Franklin*, 471 U.S. 307 (1985). In *Repoza II*, the Supreme Judicial Court interpreted *Francis* v. *Franklin*, as holding that whenever a trial court introduces the concept of "presumption" into its instructions, other language in the charge must not only contradict the incorrect language but, through explanation, harmonize it with the entire charge as well. The Supreme Judicial Court stated, "*Francis* contemplates close scrutiny to determine whether language in the instructions not only corrects the erroneous language but also explains it." *Commonwealth* v. *Repoza*, 400 Mass. 516, 520, N.E.2d 755, 757 (1987) (App. A, 5a).

When viewed in the context of the instructions actually given in this case, it is apparent that the Supreme Judicial Court reads *Francis* as requiring the equivalent of an explicit explanation or definition of the word "presumption" as meaning

"permissive inference" in order to allow the jury instructions to pass constitutional muster. *Francis* contains no such requirement. Rather, as stated in *California* v. *Brown,* 107 S.Ct. 837, 839 (1987):

> "The question . . . is . . . what a reasonable juror could have understood the charge as meaning." . . . To determine how a reasonable juror could interpret an instruction, we "must focus initially on the specific language challenged." . . . If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law.

Id., quoting Francis v. *Franklin,* 407 U.S. 307, 315-316 (1985).

Here, while the instructions given at the respondent's trial contain language concerning a "presumption" of malice arising out of the intentional use of a dangerous weapon, and while nowhere is there a specific "explanation" that only a permissive inference may be drawn from such evidence, no reasonable juror could have *applied* the instructions given as shifting the burden of proof to Repoza or as relieving the Commonwealth of its burden of proof. Because it is impossible to *apply* the instructions in a manner which shifts the burden of proof to Repoza, it is irrelevant that the term "presumption" is not specifically explained.

At Repoza's trial, the judge instructed the jury on the concept of malice as follows:

> "So what is malice as used in the words: malice aforethought? Well, it is of two kinds. It is active malice, which we all understand by the simple use of the words in this meaning: an active malice is ill

will towards someone. It is the active hatred of someone. It is a grudge or an ill feeling toward someone, harboring an attempt to hurt someone, or act of bad blood or feeling, generating motives of revenge or punishment. That is active malice. But you are not looking for active malice alone. You are looking for an unlawful, unjustified act with no extenuating circumstances, and the wrongfulness of the act itself is sufficient to sustain a finding of malice so far as the law is concerned.

"That is perhaps malice implied in law as distinct from malice that you find from the conduct of people. And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought. Because, as that term has long been understood and applied in this Commonwealth, the use of a deadly weapon, itself capable of causing harm and death, if an unjustified act with no extenuation or excuse, is sufficient itself to supply the element of malice you are looking for in determining whether a crime is murder or less than murder.

"However, the circumstances which attend to killing may be shown to rebut the presumption by showing circumstances which, although they do not excuse the killing, might mitigate it from the crime of murder to manslaughter. And this I will discuss for you when I define manslaughter."

Repoza I, 382 Mass. at 132 n.7, 414 N.E.2d at 599 n.7 (App. B, 22a).

As promised, the judge discussed mitigation which could reduce murder to manslaughter in the following terms:

> The Court has recently said that voluntary manslaughter was a killing from a sudden transport of

passion or heat of blood upon reasonable provocation without malice or upon sudden combat. Sudden combat is readily understood to be one of the events which may provoke one to kill without malice.

The Commonwealth must prove beyond a reasonable doubt every element of the crime charged, and the Commonwealth is bound to negate mitigating factors such as provocation.

Our Court has said that proof that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent that may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide.

So that I would like to say again that if the Commonwealth fails to prove absence of heat of passion on sudden provocation, but has nevertheless proved that the killing is unjustified, then you can bring in manslaughter. But if they have proved all the elements beyond a reasonable doubt, then you will bring in your verdicts as I have given them to you: first degree murder, or second-degree murder, or manslaughter.[12]

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[2] This instruction must be read in light of the law of second degree murder in Massachusetts. In Massachusetts, second degree murder can be established by proof that the defendant intended to kill *or* that he intended to inflict grave bodily harm, but not death. *Commonwealth* v. *Dunton*, 397 Mass. 101, 489 N.E.2d 1012 (1986); *Commonwealth* v. *Puleio*, 394 Mass. 101, 107-09, 74 N.E.2d 1078 (1985). In *Commonwealth* v. *Huot*, 380 Mass. 403, 408, 403 N.E.2d 411 (1980) the Supreme Judicial Court stated:

> In Massachusetts, malice, rather than a design to effect death, is the requisite mental element. Unlike the requirements of some other states, murder may be found in Massachusetts where there is no actual intent to kill. *Commonwealth* v. *Chance*, 174 Mass. 251-253 (1899). Malice aforethought includes any unexcused intent to kill, to do grievous bodily harm, or to do an act creating a plain and strong likelihood that death or grievous harm will follow.

Thus, it can be seen that in order to be satisfied that "malice" had been established, the jury had to find the following predicate facts:

(1) use of a deadly weapon, itself capable of causing harm and death;

(2) in a manner unjustified; and

(3) in a manner with no extenuation or excuse.

Malice was described as a finding dependent on the establishment of "an unlawful, unjustified act with no extenuating circumstances." *Repoza I*, 382 Mass. at 132 n.7, 414 N.E.2d at 599 n.7, (App B, 22a). The jurors were told that the Commonwealth had the obligation, "to negate mitigating circumstances such as provocation," and to prove "the absence of heat of passion or sudden provocation." Any reasonable juror hearing this instruction could only conclude that the Commonwealth had to prove more than the mere intentional use of a deadly weapon to carry its burden of proof.

A "presumption of malice" arising from the intentional use of a deadly weapon is of no unwarranted aid to the prosecution or detriment to the defendant if it is limited to intentional uses which are unjustified (i.e., not in self-defense) and undertaken without extenuation or excuse (i.e., where there is proof negating heat of passion or provocation). Whether or not the term "presumption" is explicitly "explained" matters little if a jury, applying instructions as an equation, cannot come to the conclusion that the defendant is required to rebut the "presumption" or that the "presumption" relieves the prosecution of its obligation to prove each element of the offense by affirmative evidence. By requiring "explanation", without consideration of what understanding a jury would have of the instruction as a whole, the Supreme Judicial Court has undertaken to expand the holding in *Francis* v. *Franklin*, 471 U.S. 307 (1985) in an unwarranted direction.

The opinion of the Supreme Judicial Court seems to be based on the portion of *Francis* which states that, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis* v. *Franklin*, 471 U.S. at 322. This language merely makes clear the holding in *Sandstrom* that general instructions on the presumption of innocence and burden of proof will not suffice to cure an instruction which appears to place the burden of proof to negate an element of an offense on a defendant or which relieves the Commonwealth of its burden. *Sandstrom* v. *Montana*, 422 U.S. at 526. Here, since there is no reasonable likelihood that a jury understood the instruction in an unconstitutional manner, there was no necessity of further explanation. *Francis* v. *Franklin*, 471 U.S. at 322-323 n.8.

The opinion of the Supreme Judicial Court thus transforms the holding in *Francis* from a reaffirmation of the principles of *Sandstrom* into a mechanistic test, thus creating the danger that instructions which can only be applied in a constitutional manner will be held constitutionally deficient. Such a result could not have been intended by this Court.

Conclusion.

For the reasons stated above, the petition for writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be granted.

Respectfully submitted,

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COMMONWEALTH *vs.* RICHARD REPOZA.

Middlesex. March 2, 1987. — July 23, 1987.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH, & O'CONNOR, JJ.

Practice, Criminal, Instructions to jury, Presumptions and burden of proof, Retroactivity of judicial holding. *Due Process of Law,* Presumption. *Error,* Harmless. *Homicide. Malice. Intent.*

Discussion of the principles stated in *Francis* v. *Franklin,* 471 U.S. 307 (1985), as they elucidate the holding of *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), with respect to an apellate court's assessment of the possible impact of constitutionally erroneous jury instructions in a criminal case. [517-520]

The holding of *Francis* v. *Franklin,* 471 U.S. 307 (1985), concerning impermissible burden-shifting language in instructions to a jury, was fully retroactive to a murder case tried in the Commonwealth in 1978. [520]

Discussion of the standards of review in a criminal case where the defendant made no objection to burden-shifting language in jury instructions. [520]

Certain jury instructions, given in 1978 at a murder trial, that created a presumption unconstitutionally shifting the burden of proof on the issue of malice, did not meet the requirements set forth in *Francis* v. *Franklin,* 471 U.S. 307 (1985), where no other language in the charge explained the improper instructions sufficiently to ensure that a juror did not misunderstand the instructions or view them as burden-shifting. [521-522]

A new trial was required in a murder case where error in the judge's instructions on malice was not harmless and where the defendant's intent was in issue. [522] NOLAN, J., dissenting.

INDICTMENT found and returned in the Superior Court Department on July 11, 1978.

A motion for postconviction relief, filed on August 17, 1984, was heard by *Hiller B. Zobel,* J.

After review by the Appeals Court the Supreme Judicial Court granted leave to obtain further appellate review.

The case was submitted on briefs.

Richard Repoza, pro se.

Scott Harshbarger, District Attorney, & *Fern L. Nesson*, Assistant District Attorney, for the Commonwealth.

ABRAMS, J. The question is whether *Francis* v. *Franklin*, 471 U.S. 307 (1985), requires us to grant the defendant's request for postconviction relief, Mass. R. Crim. P. 30 (a), 378 Mass. 800 (1978), following the affirmance of his conviction of murder in the second degree. See *Commonwealth* v. *Repoza*, 382 Mass. 119 (1980) (*Repoza I*). We conclude that the judge's charge impermissibly shifted the burden of proof to the defendant contrary to principles stated in *Francis* and that a new trial is required.

In 1978, a jury found the defendant guilty of murder in the second degree on an indictment charging him with murder in the first degree. We affirmed the conviction on direct appeal. See *Repoza I*, *supra*. In 1985, the defendant, with the aid of counsel, appealed from the earlier denial of a motion for postconviction relief. In his brief on appeal, he argued that the jury instructions, parts of which were erroneous because they created impermissible mandatory presumptions, failed to explain the erroneous language sufficiently, thereby violating the requirements of *Francis* v. *Franklin*, *supra*. The Appeals Court issued an order affirming the decision denying relief.[1] 22 Mass. App. Ct. 1110 (1986). We granted the defendant's application for further appellate review.

1. *Francis v. Franklin*. The question is the effect of *Francis*, *supra*, on the erroneous instructions discussed in *Repoza I*, but an understanding of *Francis* requires a brief discussion of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

In *Sandstrom*, the Supreme Court of the United States held that the instruction "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," *Sandstrom*, *supra* at 513, violates the Fourteenth Amendment's require-

[1] On direct appeal, we had considered the burden-shifting instructions pursuant to G. L. c. 278, § 33E. Thus, the Appeals Court correctly reasoned, in an unpublished memorandum, that the issue was one more properly reserved for consideration by this court. See *Commonwealth* v. *Carballo*, 381 Mass. 227 (1980); *Commonwealth* v. *Riva*, 18 Mass. App. Ct. 713, 719 (1984).

ment that the State prove every element of a criminal offense beyond a reasonable doubt. The Court explained that "[u]pon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged,' [*In re Winship*, 397 U.S. 358, 364 (1970)], and defendant was deprived of his constitutional rights as explicated in *Winship*." *Id.* at 523. The Court stated that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Id.* at 514. The Court reversed the defendant's conviction, declaring that a reasonable juror could have interpreted the instruction as establishing either a conclusive or a rebuttable presumption. Either interpretation, the Court determined, would violate due process because a reasonable juror could have interpreted the instruction as relieving the government of its burden of proof and as shifting the burden of proof to the defendant to disprove malice. The Court in *Sandstrom* did not focus its attention on whether and how language which impermissibly shifts the burden of proof may be cured by other language in the charge.[2]

In *Francis, supra*, the Court turned its attention to that very issue to clarify the effect of *Sandstrom*.[3] *Francis, supra* at

[2] The *Sandstrom* Court stated in a footnote that "[t]he potential for these [impermissible] interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. . . . But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." *Sandstrom, supra* at 518-519 n.7.

[3] The *Francis* decision, *supra* at 317, explicitly states that both conclusive and rebuttable presumptions relieve the State of its affirmative burden of proof.

309, specifically concerns the limited category of criminal prosecutions in which intent is the pivotal element of the crime charged and the only contested issue at trial. The opinion accepts the general principle that constitutionally erroneous jury instructions are not to be viewed in isolation but rather in the context of the charge as a whole, so that a reviewing court can assess the possible impact of the error on the deliberations of a reasonable juror. *Id.* at 315. See *Commonwealth* v. *Adrey*, 397 Mass. 751, 755 (1986); *Commonwealth* v. *Medina*, 380 Mass. 565, 577-580 (1980).

The Court repeated its language in *Sandstrom*, see note 2 *supra*, that general instructions as to the State's burden and the defendant's presumption of innocence do not dissipate the error in instructing the jury impermissibly as to burdens. *Id.* at 319. The Supreme Court then stated that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity" because "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict" (footnote omitted). *Id.* at 322.[4] The Court held "that contradictory instructions as to intent — one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion — create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility" (emphasis in original). *Id.* at 323 n.8.[5]

[4]We have reached the same result in cases in which instructions on reasonable doubt were conflicting. See, e.g., *Commonwealth* v. *Wood*, 380 Mass. 545, 548-550 (1980).

[5]In *Francis*, the impermissible instructions were "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" and "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Francis*, *supra* at 309. The second instruction was followed by an instruction that "[a] person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the

Francis determines that a reviewing court cannot have confidence in the propriety of a subsequent verdict of guilty unless some other portion of the charge not only contradicts the incorrect language but, through explanation, harmonizes it with the entire charge as well. *Francis* contemplates close scrutiny to determine whether language in the instructions not only corrects the erroneous language but also explains it.

2. *The standard of review.* Judicial holdings concerning impermissible burden-shifting language in instructions generally are applied retroactively. See *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977); *Dietz* v. *Solem*, 640 F.2d 126, 130 (8th Cir. 1981). Because *Francis* develops the method by which appellate courts should review and evaluate a *Sandstrom* error, its holding is fully retroactive. See *Commonwealth* v. *Breese*, 389 Mass. 540, 543-544 (1983). However, the Supreme Court also has ruled that, in cases involving burden-shifting instructions, States may "insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson, supra* at 244 n.8. See *Dietz, supra* at 132.

As a matter of State law, we have determined that we would not require lawyers to be clairvoyant and to object to instructions not yet identified as constitutional error. See *DeJoinville* v. *Commonwealth*, 381 Mass. 246, 248, 251 (1980); *Connolly* v. *Commonwealth*, 377 Mass. 527, 529-530 (1979); *Commonwealth* v. *Collins*, 374 Mass. 596, 599 (1978); *Commonwealth* v. *Stokes*, 374 Mass. 583, 588-591 (1978). We have said that, in cases in which erroneous malice aforethought instructions were given, we would review the instructions, being more tolerant in that review of instructions given before *Sandstrom*, and we would bring greater expectations and more careful scrutiny to malice instructions in cases which went to trial after the *Sandstrom* decision. See *Connolly, supra; Collins, supra; Stokes, supra*. Thus, while we did not insist on an objection, we followed a moderate approach in our analysis.

act for which the accused is prosecuted." *Id.* at 311-312. The Court concluded that the latter instruction was merely inconsistent with, and therefore inadequate to cure, the immediately preceding error. *Id.* at 322.

3. *The direct appeal.* Repoza's trial took place approximately one year before the *Sandstrom* decision. Pursuant to our policy to review such errors, on direct appeal and pursuant to G. L. c. 278, § 33E, we reviewed the instructions and determined that the instructions on malice indeed did violate the principles enunciated in *Sandstrom*. We determined, however, that "the judge's erroneous equating of malice implied or inferred to malice presumed was ultimately vitiated by his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth." See *Repoza I, supra* at 134. We concluded that the instructions did not require a new trial or the entry of a lesser degree of guilt.[6]

We recognized in *Repoza I, supra* at 132-133, that the malice instructions created an unconstitutional burden-shifting presumption on the issue of malice aforethought. No language in the rest of the charge explained these impermissible instructions sufficiently to ensure that a juror did not misunderstand the instructions or could not view them as burden-shifting. Language explaining the presumption of innocence and the Commonwealth's burden of proof, and stating that "[a]ll the presumptions of law independent of evidence are in favor of innocence," *Repoza I, supra* at 134, did not cure the possibility that, "[i]n light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of [stabbing the victim] and its ordinary consequences constituted proof of

[6]The defendant asserts that the failure to object to the instructions amounted to ineffective assistance of counsel. Because we had reviewed the instructions and concluded that they did not create a substantial likelihood of a miscarriage of justice, *Repoza I, supra* at 134-135 & n.8, there is no showing that "better work might have accomplished something material for the defense" (footnote omitted). *Commonwealth* v. *Satterfield*, 373 Mass. 109, 115 (1977). See *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974). Because *Sandstrom* had not been decided at the time of trial, an objection by counsel could not have been expected. As a result, we reviewed the instructions on appeal.

The defendant makes a number of other claims of ineffective assistance of counsel. Those claims either are without merit or without basis in the record.

intent beyond a reasonable doubt unless the defendant per suaded the jury otherwise." *Francis, supra* at 319. Clearly, the instructions at trial do not meet the requirements of *Francis*.

4. *Relief.* At Repoza's trial, the main contested issue was identification, not intent.[7] The jurors resolved the identification issue, finding beyond a reasonable doubt that the defendant was the individual who killed the victim. The jurors also clearly rejected a conviction of murder in the first degree. The error in the instructions which defined malice aforethought as an element of the crime of murder in the second degree admittedly was burden-shifting. The jurors may have rejected the conviction of murder in the second degree had the instructions on malice aforethought not been burden-shifting or had the impermissible instructions been "explained." Thus, the impermissible presumption language may have made a difference between a verdict of not guilty, guilty of murder in the second degree, or of manslaughter, a verdict which was consistent with the evidence and on which the judge instructed. We therefore reverse the order denying the defendant's motion and remand the matter to the Superior Court for a new trial.

So ordered.

[7] The dissent correctly notes that identification was the pivotal element at trial in the instant case. However, under G. L. c. 265, § 1, the degree of murder is for the jury. The higher degree of murder is based on the defendant's intent. Therefore, under our statute there is always an element of intent for the jury to determine in murder cases in which the defendant does not concede that a conviction of murder in the first or second degree would be warranted if the proper person were prosecuted. See, e.g., *Commonwealth* v. *Lee*, 383 Mass. 507, 512 (1981). At no point at either the trial or the direct appeal did the defendant concede that a murder, and not a manslaughter, had occurred. Thus, intent was a live issue and the error cannot be considered to be harmless beyond a reasonable doubt. Cf. *Commonwealth* v. *Shea*, 398 Mass. 264, 269-270 (1986); *Commonwealth* v. *Ely*, 388 Mass. 69, 74 (1983); *Commonwealth* v. *Tameleo*, 384 Mass. 368, 370 (1981).

It should be noted that the dissent does not disagree with the court's analysis of the *Francis* decision.

NOLAN, J. (dissenting). The unconstitutional instructions in this case were clearly harmless beyond a reasonable doubt because the defendant never contested the issue of malice. Identification was the only viable issue and despite the court's language to the contrary, the defendant all but conceded the fact that a murder was committed. Therefore, the erroneous language did not contribute to the defendant's conviction of murder in the second degree.

In *Commonwealth* v. *Lee*, 383 Mass. 507, 510-513 (1981), we recognized that the prejudicial effect of a *Sandstrom* violation is determined by the defense asserted at trial. Harmless error analysis was held to be particularly appropriate where the defendant does not dispute the Commonwealth's version of how the murder occurred, but only claims that he is not the murderer. *Id.* at 512. "In such circumstances, the failure to object to the charge as to malice cannot be attributed to inadvertence or lack of knowledge of evolving constitutional doctrine. Rather, the failure to object reflects a conscious choice of trial strategy by defense counsel." *Id.*

At trial, the defendant's attorney did not object to these instructions despite the fact that the prosecutor alerted the judge to the erroneous language. Nor did defense counsel seek review of these instructions on appeal the first time around. The most plausible explanation for these decisions is that counsel realized that the "evidence here raised no issue of justification, mitigation, or lack of intent on the part of the perpetrator." *Id.* at 513.

Therefore, I dissent.

COMMONWEALTH vs. RICHARD REPOZA.

Middlesex. September 9, 1980. — December 15, 1980.

Present: HENNESSEY, C.J., QUIRICO, WILKINS, LIACOS, & ABRAMS, JJ.

Practice, Criminal, Capital case, Instructions to jury, Presumptions and burden of proof. *Evidence,* Cross-examination, Judicial discretion, Relevancy and materiality, Photograph, Identification. *Homicide. Malice.*

At a criminal trial, the judge did not err in excluding further inquiry into the substance of a conversation between a witness and the prosecutor during a recess in the trial after the defendant had been permitted to establish that the prosecutor had refreshed the witness's memory as to certain events but that the witness had not been instructed as to how to testify. [125-126]

At the trial of a defendant charged with murder after he allegedly stabbed the victim during a brawl between two groups of young people, the judge did not abuse his discretion in admitting in evidence a lead-weighted leather glove which was found in the course of a police search of the vicinity of the brawl on the night of the crime and which allegedly had been carried by one of the defendant's friends. [126-128]

At the trial of a defendant charged with murder after he allegedly stabbed the victim during a brawl between two groups of young people, the judge did not abuse his discretion in admitting photographs of the location where the victim had fallen which depicted unmistakable bloodstains on the sidewalk, inasmuch as the precise location of the victim at the time of the stabbing was a critical element of both the defendant's and the Commonwealth's case. [128-129]

At a murder trial, the judge did not err in permitting a police officer to testify as to a witness's prior extrajudicial identification of the defendant to corroborate the witness's in-court identification. [129-130]

At a criminal trial, the judge's instructions with respect to the evidentiary effect of a negative answer to a leading question were not, taken in their entirety, erroneous. [131]

At a murder trial, the judge's erroneous instructions with respect to a presumption of malice arising from the intentional use of a deadly weapon did not require reversal of the defendant's conviction where the instructions were otherwise clear and correct as to the Commonwealth's burden of proof and left no doubt that the jury could

return a verdict of murder only of they were satisfied of the existence of malice beyond a reasonable doubt. [132-135]

INDICTMENT found and returned in the Superior Court Department on July 11, 1978.

The case was tried before *Tamburello*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Paul P. Caradonna for the defendant.

Kevin C. McLean, Assistant District Attorney, for the Commonwealth.

QUIRICO, J. In the early morning of June 10, 1978, during the violent aftermath of a high school graduation party, John P. Grogan died of a knife wound to his heart. The defendant, Richard Repoza, was apprehended at the scene, was indicted by a grand jury for murder in the first degree, and, on November 2, 1978, following a nine-day jury trial, was found guilty of Grogan's murder in the second degree. On this appeal pursuant to G. L. c. 278, §§ 33A-33G, the defendant assigns a number of errors allegedly committed by the trial judge during the course of the trial, and in addition seeks to invoke the power of extraordinary review given this court by the provisions of G. L. c. 278, § 33E.[1] Neither our review of the defendant's specific assignments of error nor our independent review of the record reveals any error requiring reversal of the defendant's conviction or the entry of a verdict of a lesser degree of guilt.

Although a number of questions regarding Grogan's death remain unresolved or disputed, the outline of the

[1] Prior to July 1, 1979, G. L. c. 278, § 33E, provided for a full review by this court of any case tried on an indictment for murder in the first degree, and resulting in a conviction for murder in the second degree. By St. 1979, c. 346, § 2, the statute was amended to provide for special review only of cases in which the indictment leads to a conviction for murder in the first degree. This case, however, falls within the category of cases in which the offense resulting in the conviction was committed prior to July 1, 1979, and which thus remained eligible for our review under the rule announced in *Commonwealth* v. *Davis*, 380 Mass. 1, 12-17 (1980).

events preceding the killing is relatively clear. On the evening of June 9, 1978, Carlos Vargas hosted a party at his home at 8 Hammond Street, Somerville, to celebrate his graduation from Somerville Technical Trade High School. In addition to his school friends, Vargas invited to the party his steady girl friend, a resident of East Cambridge, and suggested that she invite others. Most of Vargas' guests arrived at about 8 P.M. Somewhat later, a group of about eight Cambridge youths, all of whom learned of the party through Vargas' girl friend, arrived at the Vargas house. About 8:30 P.M., the defendant and a friend, John Cavallaro, both of whom were from Cambridge and friendly with the other Cambridge guests, arrived. In all the party was attended by about fifteen boys from Somerville, six from Cambridge, and a total of sixteen to twenty girls in approximately equal numbers from each city.

The party continued without incident until about midnight. The defendant was "hanging around," dancing, talking, and perhaps watching television, and he caused no trouble. Carlos Vargas had not asked him or any of the Cambridge group to leave.

About midnight, Robert Devereaux of Somerville and Joseph Long of Cambridge became involved in a scuffle in the Vargas dining room. Devereaux thought that Long was bothering some of the girls at the party and tried to stop him. Zenalia Vargas, Carlos' mother, separated the two, and told the crowd that the party was over; she went to the cellar and removed an electrical fuse, thus stopping the music and ending the party. The Vargas house emptied almost immediately into Hammond Street. Carlos Vargas told the group to move away from his house and everyone moved northerly along Hammond Street and turned easterly onto Concord Avenue. Near the intersection of Concord Avenue and Hammond Street, Long and Devereaux resumed their fight, now surrounded by a crowd.

As is perhaps to be expected, the testimony describing the events which followed is somewhat conflicting. The Commonwealth produced four witnesses who testified that the

defendant was at the scene of this fight with the knife later identified as the murder weapon. The first of these witnesses was Carlos Vargas. As he watched the fight, Repoza approached him with a knife in his hand, and, standing at about arm's length, said, "No, this is your party," or, "This is your party." As Vargas backed away, he was seized from behind by Francis Kelley, the first police officer at the scene, and the two began to grapple.

By the time Vargas had been subdued, Grogan had been stabbed. According to Officer Kelley, there was general fighting when he arrived on Concord Avenue. At some point after he arrived, the fight between Long and Devereaux broke up. Long retreated to the stairs of a three-story house diagonally across Concord Avenue from Hammond Street. Also on or near the stairs were the defendant, Robert Devereaux, Richard Trevisone, James Poplawski, and two girls from Cambridge. Both Devereaux and Long testified that while they were on the stairs, Devereaux kicked Long in the face; Long was knocked down from the stairs, and disappeared into the crowd, from which he emerged semi-conscious some moments later.

Three witnesses testified to seeing Repoza at the stairs holding a knife. Trevisone testified that while on the stairs, Repoza was holding a knife exposed in his hand. After telling Repoza three times to drop it, Trevisone grabbed him by the left hand and the neck and dragged him into the street. Repoza switched the knife from one hand to the other and offered to fight Trevisone. At this point, Poplawski attempted to intervene, but was struck by Long with a picket torn from a nearby fence. The victim, John Grogan, was also seen fighting in the immediate area. When Poplawski was struck, Repoza and Long, pursued by Poplawski and Trevisone, ran westerly down Concord Avenue toward Beacon Street. Ahead of them, running in the same direction, Grogan was pursuing two other unidentified persons. Trevisone saw Grogan stop, turn around, and punch the person he had chased. With Trevisone some twelve feet behind him, the defendant ran toward Grogan and, drawing

abreast of him, struck him once in the left side of the chest with the knife. Repoza then continued his flight. Trevisone stopped momentarily, then resumed his pursuit of Repoza. Near the corner of Beacon Street and Concord Avenue, Trevisone overtook Repoza, and delivered three kicks, one to Repoza's stomach and two to his groin. Trevisone was then jumped from behind and lost the defendant. Seeing a police car turn onto Concord Avenue in front of him, Trevisone ran back to the Vargas house, but after a minute he returned to where Grogan was lying. Trevisone approached one of the police officers present and said, "You have to get him," or, "You can get him." Then, accompanied by an officer, Trevisone walked toward Hammond Street. The defendant was at this time handcuffed and sitting in the back seat of a police cruiser; on seeing him Trevisone immediately identified him as Grogan's assailant.

Trevisone was the only witness who testified that he saw the defendant stab Grogan. Significant details of his testimony, however, were corroborated by other witnesses. Poplawski saw Repoza with a knife on the porch of the house on Concord Avenue, and participated in the ensuing chase. He saw Grogan cross onto the sidewalk of Concord Avenue. Poplawski caught Long, knocked him down and kicked him. Looking up, he saw Trevisone, Repoza, and Grogan close together on Concord Avenue; he then saw Repoza "punch" Grogan in the upper chest, and watched Grogan stumble toward him bleeding. Poplawski chased Repoza around the corner of Beacon Street, and saw him throw something to his right near the corner. Poplawski caught Repoza on Beacon Street, where both were "grabbed" by Officer Robert F. Hodnett. Thinking that Repoza might escape, Poplawski said to Hodnett, "Grab him. He is the one who stabbed him." Officer Hodnett escorted both youths back to Concord Avenue and placed them in patrol cars; Poplawski subsequently made a second identification of Repoza.

Officer Michael F. Gaughan and Detective Philip J. Oteri were also at the scene of the fight. Gaughan escorted

Trevisone to the cruiser in which Repoza had been placed; both he and Oteri testified that Trevisone positively identified Repoza at that time. Oteri found the knife later identified as the murder weapon in a place consistent with Poplawski's description of where it had been thrown by Repoza. Finally, the Commonwealth presented a resident of Concord Avenue, who, awakened by the noise of the fight, looked out her window in time to see a group of about six persons leave the main group and run toward her house. As they passed her house, Grogan seized his chest, staggered, and fell, bleeding.[2]

Repoza did not testify in his own behalf. Two girls from the Cambridge group testified that they were with Repoza immediately after the Long-Devereaux fight, and that they saw no knife. There was also testimony by these two Cambridge girls that, following his fight with Long, Devereaux threatened them with a knife. A number of other defense witnesses testified to details of the brawl, which, if believed, might have cast doubt on the account given by the Commonwealth's witnesses. None, however, significantly undermined the central eye-witness testimony given by Trevisone and Poplawski.

1. *Evidentiary rulings.* Initially, the defendant assigns as error four evidentiary rulings made by the trial judge. These include certain limitations on the defendant's cross-examination of Trevisone, the admission in evidence of a weighted glove found at the scene of the crime, the admission of numerous photographs of the scene, and the admis-

[2]The Commonwealth also placed John Cavallaro on the stand. Cavallaro was from Cambridge and had arrived at the party with the defendant. He was the only member of the Cambridge group to testify for the Commonwealth. On direct examination, Cavallaro's testimony largely corroborated the account of events given by Trevisone and Poplawski. He was, however, a sufficiently difficult witness that the judge allowed the Commonwealth to use leading questions during direct examination. Under cross-examination, Cavallaro stated that he saw the victim emerge from a "pile" of people on the ground, then stagger and fall. Because Cavallaro's testimony was not essential to the Commonwealth's case, and because there was ample reason for the jury to disregard it, we do not dwell on it here.

sion of certain testimony from Detective Oteri as to Trevisone's on-the-scene identification of the defendant. We discuss these points seriatim; in none do we find any error.

a. *Scope of cross-examination.* Defense counsel by cross-examination sought to develop certain inconsistencies between Trevisone's description at the trial of the stabbing and a physical demonstration of the incident given by Trevisone at the earlier probable cause hearing. The Commonwealth objected on the ground that the transcript of the probable cause hearing did not adequately reflect the details of the earlier demonstration. After repeated attempts at clarification, including two bench conferences, the court took a twenty-four minute recess. Immediately following the recess, defense counsel elicited from Trevisone the information that, during the recess, he had met with the prosecutor in the prosecutor's office, that they had discussed the case, and that the prosecutor had refreshed his memory. Trevisone further testified that he had not been told what to say. At that point, the judge excluded further inquiry into the substance of the conversation.

The accused in a criminal case is, of course, guaranteed the right to reasonable cross-examination of the State's witnesses. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). *Commonwealth* v. *Dougan*, 377 Mass. 303, 310 (1979). Equally well settled, however, is the principle that "the scope of cross-examination, including to what extent the accuracy, veracity, and credibility of a witness may be tested, rests largely in the sound discretion of the judge, not subject to revision unless prejudice is shown to a party by reason of too narrow restriction or too great breadth of inquiry." *Commonwealth* v. *Smith*, 329 Mass. 477, 479 (1952). *Commonwealth* v. *Underwood*, 358 Mass. 506, 513 (1970). The burden of showing an abuse of discretion and resulting prejudice is on the defendant, and our determination must be made by considering the cross-examination in its entirety. *Commonwealth* v. *Hall*, 369 Mass. 715, 731 (1976). On this record, there is no sign of prejudice. The defendant was allowed to establish that Trevisone had had his memory

refreshed and that he had not been instructed as to how to testify. Significantly, defense counsel was ultimately successful in his attempt to show that Trevisone was unsure as to how the defendant was holding the knife when the fatal blow was struck. At most, this was an instance in which "the judge's ruling 'did not totally exclude cross-examination . . . [about the witness's conversation with the prosecutor], but only limited additional questions on that subject once it had already been raised and explored to some extent before the jury.'" *Commonwealth* v. *Smallwood*, 379 Mass. 878, 889 (1980), quoting from *Commonwealth* v. *Watson*, 377 Mass. 814, 837 (1979). It is clear that such a ruling is within the province of the trial judge absent a particularized showing of prejudice wholly lacking here. *Commonwealth* v. *Hall*, *supra*. See *Commonwealth* v. *Valliere*, 366 Mass. 479, 492 (1974) (no error in excluding question as to why police detective had interfered in discussion between defense counsel and prosecution witness in corridor outside court room during a break in trial).

b. *Admissibility of "sap glove."* The defendant next challenges the admission in evidence of a lead-weighted leather glove, or "sap glove," found in the course of a police search of Concord Avenue on the night of the crime. This weapon played a relatively minor part in the Commonwealth's case. It was first mentioned on the second day of trial during the testimony of Carlos Vargas. Defense counsel had, during an extended cross-examination of Vargas, inquired broadly into the circumstances surrounding the Long-Devereaux fight. On redirect examination, the judge allowed Vargas to testify over the defendant's objection that he had seen someone other than the defendant at the scene of the fight with something "they could use for hitting people." Defense counsel then elicited from Vargas testimony that he had seen Kenneth Belski, of Cambridge, with a weapon at the scene of the fight. Finally, on further redirect examination, Vargas was allowed to testify that he had seen Belski with a sap glove. The glove itself was allowed in evidence when Officer Hodnett identified it as

having been found during his search of Concord Avenue shortly after the stabbing. On the sixth day of trial, Detective Oteri testified without objection as to the use of sap gloves. On the seventh day of trial, the defendant called Belski to the witness stand, and on cross-examination the prosecutor elicited his denial that he had been armed with the sap glove on the night of the crime.

The defendant now claims that admission of the sap glove was prejudicial in that it may have given rise to an inference that persons associated with him were armed and predisposed to cause trouble when they arrived at Vargas' party. That it appears in retrospect that an inference harmful to the defendant may have been drawn from this evidence is not, without more, a ground for appeal. In a recent and similar case involving a homicide which occurred in the course of a violent clash between two opposing groups, this court had occasion to emphasize the breadth of a trial judge's discretion in admitting penumbral evidence of events preceding the homicide. *Commonwealth* v. *Alicea*, 376 Mass. 506, 522 (1978). Articles discovered at or near the scene of a crime have consistently been held admissible by this court where they tend to shed light on the setting in which the crime occurred. *Commonwealth* v. *Murphy*, 356 Mass. 604, 610 (1970). *Commonwealth* v. *Wallace*, 326 Mass. 393, 395-396 (1950). *Commonwealth* v. *Giacomazza*, 311 Mass. 456, 470 (1942). *Commonwealth* v. *Russ*, 232 Mass. 58, 79 (1919). *Commonwealth* v. *Retkovitz*, 222 Mass. 245, 249 (1915).

In this case, both the Commonwealth and the defendant presented detailed evidence of the circumstances preceding John Grogan's death. Defense counsel claimed, and was allowed, broad latitude in presenting evidence "incidental to the total concept of what happened that night." This court will not disturb a trial judge's discretionary ruling where, as here, the defendant seems to have been "as much interested in developing [the disputed material] as the prosecution." *Commonwealth* v. *Alicea*, *supra*. Cf. *Commonwealth* v.

Williams, 379 Mass. 600, 605-606 (1980); *Commonwealth* v. *Gouveia*, 371 Mass. 566, 570 (1976).[3]

c. *Photographic evidence.* The Commonwealth introduced as exhibits fifteen photographs, twelve of them in color, all taken on the day of Grogan's death. A number of these depict unmistakable bloodstains on the sidewalk and the travelled surface of Concord Avenue at the location where the victim fell after being stabbed. The defendant objects generally to their admission, claiming that they were highly inflammatory and possessed only cumulative evidentiary value, as the jury had taken an extensive view of Concord Avenue early in the trial.

There was no error in admitting these photographs. It is axiomatic that the admissibility of photographic evidence is committed to the sound discretion of the trial judge, limited only in those rare instances in which the probative value of the evidence is overwhelmed by its inflammatory potential. *Commonwealth* v. *Cobb*, 379 Mass. 456, 468-469 (1980). *Commonwealth* v. *Amazeen*, 375 Mass. 73, 84 (1978). *Commonwealth* v. *Bys*, 370 Mass. 350, 360-361 (1976). The precise location of the victim at the time of the stabbing was a critical element of the defendant's, as well as the Commonwealth's, case. The judge carefully instructed the jury prior

[3]The defendant further argues that the prosecutor in closing argument improperly intimated that the sap glove belonged to the defendant. In closing argument, the prosecutor referred to the glove and said "Where did this come from? Young Belski never saw [it] before. But who said he threw it away? Who saw him throw it away? Who does this glove fit? I suggest to you, try it on when you get out into the jury room. They were ready, and [the defendant] was ready to use that knife that night going up the street." Although this passage is not without its ambiguities, read in the context of the conflicting testimony as to possession of the glove, it appears to be directed to the fact that other members of the Cambridge group were armed at the party. Carlos Vargas, of course, testified to this fact at trial. Particularly where the defendant failed to object to the challenged statement during the closing argument, and requested no limiting instruction as to inferences to be drawn from the discovery of the sap glove at the scene of the killing, the quoted passage presents no basis for reversal. *Commonwealth* v. *Earltop*, 372 Mass. 199, 203-204 (1977).

to admitting the first photograph that it was admitted for the sole purpose of showing the location of the victim's body and not to show the presence of bloodstains. Similar instructions were repeated on at least three occasions as other photographs were admitted. We recognize that, in the final analysis, any amount of limiting instruction may be insufficient to overcome the commonsense observation of a jury that a stab wound to the heart will cause considerable bleeding. But where the allegedly inflammatory element of a photograph offered as evidence is a natural and inevitable incident of the crime, and the photograph is otherwise probative, there is little basis to disturb the ruling of a trial judge as to its admissibility. Compare *Commonwealth* v. *Cobb*, *supra*, with *Commonwealth* v. *Allen*, 377 Mass. 674, 678-680 (1979); and *Commonwealth* v. *Richmond*, 371 Mass. 563 (1976).[4]

d. *Admissibility of testimony as to extrajudicial identification.* Philip Oteri, a detective for the Somerville police department, was allowed at trial to testify that shortly after Grogan was stabbed, Trevisone was escorted to the police cruiser in which Repoza was sitting, at which point Trevisone stated, "That's him. That's the one who stabbed John." The defendant, in his final evidentiary point, argues that this testimony was inadmissible hearsay.

The hearsay rule renders extrajudicial statements inadmissible only if they are offered to prove the truth of the matters asserted in the statement. W.B. Leach & P.J. Liacos, Massachusetts Evidence 183 (4th ed. 1967). Before Oteri testified, Trevisone had, from the witness stand, identified the defendant as the person who stabbed Grogan, and had further testified that when he observed Repoza in a

[4]In closing argument, defense counsel drew the jury's attention to the nature of the victim's wound — "through the ventricle, the pumping chamber of the heart, spurts it right out" — in an attempt to demonstrate that the wound was inconsistent with the Commonwealth's account of the circumstances surrounding the stabbing. Without questioning the effectiveness of this argument, we note that it underscores the futility of trying to keep from the jury in a case such as this the gruesome nature of the victim's wounds.

police cruiser on the night of the crime, he had stated to Officers Gaughan and Oteri, "That's him." Oteri's testimony was thus admissible under the rule allowing testimony as to prior extrajudicial identifications to be introduced to corroborate an in-court identification. *Commonwealth* v. *Sheeran*, 370 Mass. 82, 87 (1976). *Commonwealth* v. *Swenson*, 368 Mass. 268, 273 (1975). *Commonwealth* v. *Leaster*, 362 Mass. 407, 411-412 (1972). See *Commonwealth* v. *Redmond*, 357 Mass. 333, 341 (1970). In these circumstances, the testimony is admitted "not for the truth of the matter asserted, but to corroborate the fact of prior identification." *Commonwealth* v. *Sheeran*, *supra*.[5] Although a limiting instruction as to the effect of such testimony is preferable, *Commonwealth* v. *Leaster*, *supra* at 412, such an instruction is not mandatory where, as here, the jury would naturally view the testimony as merely corroborative.[6] *Commonwealth* v. *Denault*, 362 Mass. 564, 567 (1972).

2. *Instructions to the jury.* Two points arising from the trial remain for discussion. Both have to do with the judge's instructions to the jury. The first is raised by the defendant in his brief; the second we discuss in accordance with our obligation under G. L. c. 278, § 33E, to review the record in this case to determine whether justice may require a new trial or the entry of a verdict of a lesser degree of guilt.

---

[5]We note that the use in evidence of an extrajudicial identification is not limited to corroboration. Such an identification may also be offered (a) for the purpose of impeachment and (b) as substantive evidence of the identification, where the witness is available in court to testify, but is either unable or unwilling to make an in-court identification. See *Commonwealth* v. *Vitello*, 376 Mass. 426, 459-461 (1978), and authorities cited.

[6]The corroborative nature of Detective Oteri's testimony must have been particularly obvious to the jury in this case. Two prosecution witnesses, Trevisone and Poplawski, identified the defendant as Grogan's assailant. On the fourth day of trial, two days prior to Oteri's appearance, Officer Gaughan testified without objection to Trevisone's on-the-scene identification of the defendant. His testimony was substantially identical to that challenged here. In addition, a third police officer, Hodnett, testified to an extrajudicial identification of the defendant made by Poplawski, again without defense objection and prior to Oteri's appearance.

a. *Instructions on leading questions.* The defendant asserts that the judge erred in his instructions to the jury with regard to the evidentiary effect of a negative answer to a leading question. The instruction to which the defendant particularly objects occurred on the second day of trial. During his cross-examination of Trevisone, defense counsel asked, "Do you recall Richard Repoza jumping into the [Long-Devereaux] fight, trying to break it up?" to which Trevisone answered, "No." The judge then instructed the jury as follows: "Now, I am going to say to the jury, when the answer is 'no' to a question, you are not to take the body of the question as evidence, or to wonder or speculate if it was evidence. If the evidence [*sic*] is 'No', you are to disregard entirely the contents of the question, unless and until it is proved by somebody else at a later time. If somebody asked me, 'Judge, were you in New York last night?' and I said, 'No,' you are not to wonder if I was in New York. It just is not any evidence at all."

Defense counsel than thanked the judge and continued his cross-examination. On two other occasions during the trial, the judge again instructed the jury that the contents of a leading question are not evidence and must be disregarded unless and until they are properly proved. No objection was made nor exception saved by defense counsel when any of these rulings was made. See Mass. R. Crim. P. 22, 378 Mass. 892 (1979).

On this appeal, it is argued that the final two sentences of the quoted instruction were misleading in that the example cited by the judge would at least produce evidence that the person answering was not in New York on the night in question. We disagree. Read in their totality, the judge's instructions on this point were such that no reasonable juror could have been misled by them. Cf. *Commonwealth* v. *Medina*, 380 Mass. 565, 577 (1980). Since this issue was not raised at trial, either by objection or by a request for clarifying instructions, our reviewing function is limited indeed. See *Commonwealth* v. *Walden*, 380 Mass. 724, 731 (1980). In this instance, however, no review, whether limited or plenary, would lead to a different conclusion.

b. *Instruction on malice.* While we find no error in any of the points argued by the defendant, the provisions of G. L. c. 278, § 33E, bring the "whole case" here for consideration of both law and evidence. We therefore discuss one further point.

In his charge to the jury on the element of malice required to support a murder conviction, the judge spoke twice of a "presumption" of malice arising from the intentional use of a deadly weapon in a homicide.[7] This was incorrect.

While the element of malice aforethought necessary to elevate homicide to murder may be inferred from the intentional use of a deadly weapon, *Commonwealth* v. *Campbell*, 375 Mass. 308, 312-313 (1978), it is constitutionally required that the Commonwealth prove every essential element of a crime beyond a reasonable doubt. *Commonwealth* v. *Callahan*, 380 Mass. 821, 825 (1980), and cases cited. Well before the trial in this case, this court had made clear the impropriety

[7] In his instructions to the jury at the close of trial, the judge explained the concept of malice aforethought in the following terms: "So what is malice as used in the words: malice aforethought? Well, it is of two kinds. It is active malice, which we all understand by the simple use of the words in this meaning: an active malice is ill will towards someone. It is the active hatred of someone. It is a grudge or an ill feeling toward someone, harboring an attempt to hurt someone, or act of bad blood or feeling, generating motives of revenge or punishment. That is active malice. But you are not looking for active malice alone. You are looking for an unlawful, unjustified act with no extenuating circumstances, and the wrongfulness of the act itself is sufficient to sustain a finding of malice so far as the law is concerned.

"That is perhaps malice implied in law as distinct from malice that you find from the conduct of people. *And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought.* Because, as that term has long been understood and applied in this Commonwealth, the use of a deadly weapon, itself capable of causing harm and death, if an unjustified act with no extenuation or excuse, is sufficient itself to supply the element of malice you are looking for in determining whether a crime is murder or less than murder.

"However, *the circumstances which attend to killing may be shown to rebut the presumption* by showing circumstances which, although they do not excuse the killing, might mitigate it from the crime of murder to manslaughter. And this I will discuss for you when I define manslaughter." (Emphasis supplied.)

inherent in the use of language which might suggest to a jury that any element of a crime may be presumed, or that the burden of rebutting the Commonwealth's case ever shifts to or rests on the defendant. *Commonwealth* v. *Collins*, 374 Mass. 596, 600 n.2 (1978). *Commonwealth* v. *Rodriguez*, 370 Mass. 684 (1976). Moreover, we had announced our intention to scrutinize carefully cases decided after *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), for the constitutional adequacy of the instructions given to the jury regarding the Commonwealth's burden of proof. *Commonwealth* v. *Collins*, *supra* at 599.

Several recent cases further articulate the nature of the scrutiny alluded to in *Collins*. In *Commonwealth* v. *Callahan*, *supra*, we reversed a conviction of murder in the first degree based on our conclusion that, in that case, the judge's instructions as to a "presumption" of malice arising from proof of the defendant's intentional use of a deadly weapon had created the substantial risk of a miscarriage of justice. *Id.* at 822. The jury charge in that case was defective in two respects. First, after instructing the jury that the legal effect of a presumption is to require that a certain conclusion be drawn from facts proved, the judge used language of presumption six times in explaining to the jury the effect of the Commonwealth's proof of the use of a deadly weapon. We held that the charge to the jury in that case, taken as a whole, clearly stated that unless the defendant had introduced some evidence negating malice, the jury were required to find malice from proof that the defendant intentionally used a deadly weapon to cause the victim's death. *Id.* at 824-825. The language of that charge, we held, clearly reflected an unconstitutional shifting of the burden of proof to the defendant to disprove malice. *Id.* at 824-825.

The second and equally grave defect in the *Callahan* charge involved the judge's reference to the "'plain and obvious principle that a person must be presumed to intend'" the natural, probable, and usual consequences of his voluntary acts. *Id.* at 823. Notwithstanding the small difference between the use of "must" and "may," we held that the use

of "must" in this context is reversible error when it could reasonably be interpreted, in light of the entire charge, to relieve the Commonwealth of any part of its burden of proof. *Id.* at 825.

The decision in *Callahan* exemplifies our rejection of an approach either narrow or mechanistic in our consideration of the issue raised in the present case. Cf. *Commonwealth* v. *Collins*, *supra*. In each case, the question "'whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction' . . . and . . . error is avoided if the charge, read as a whole, makes clear the Commonwealth's burden." *Commonwealth* v. *Medina*, *supra* at 578, quoting from *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979). Here, as in *Medina*, the judge's erroneous equating of malice implied or inferred to malice presumed was ultimately vitiated by his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth. The judge began his instructions by explaining the presumption of innocence, stating clearly that the defendant "need not present evidence of his innocence, but may rest inactive and secure until the Commonwealth goes forward with evidence and proves him guilty." The charge went on at some length to state that every essential element of the crime must be proved by the Commonwealth beyond a reasonable doubt. The judge explicitly stated that "[a]ll the presumptions of law independent of evidence are in favor of innocence." The presentation of the nature and effect of permissible inferences was thoughtful and detailed. Finally, we think that the instructions on the nature of malice aforethought, which came after the judge's erroneous use of the word "presumption," were sufficient to dispel any misconception that might have been created by the error. These instructions left no doubt that the jury could return a verdict of murder only if they were satisfied of the existence of malice beyond a reasonable doubt.

In *Commonwealth* v. *Medina*, *supra* at 577-578, we found no error requiring reversal in a charge which made a single reference to a "presumption" of malice, but which was otherwise clear and correct as to the Commonwealth's burden of proof. Again, in *Commonwealth* v. *Fitzgerald*, 380 Mass. 840, 844-846 (1980), we upheld instructions substantially identical to those given here. Here, as in *Fitzgerald*, we are convinced that, read as a whole, the judge's instructions indicated that the jury "were required to find malice in order to convict of murder; [they] did not imply that the jury had to find an absence of malice in order to acquit of murder." *Id.* at 845.[8]

3. *Further § 33E considerations.* We reach finally the question whether the verdict in this case was supported by

[8] Although our decision in this case does not rest upon the failure of defense counsel to except to the incorrect instruction, it is well to note that trial counsel share with the judiciary the responsibility for ensuring that juries are properly instructed as to the Commonwealth's burden of proving a crime. *Commonwealth* v. *Fitzgerald*, 380 Mass. 840, 842 n.2 (1980). *Commonwealth* v. *Medina*, 380 Mass. 565, 577 n.5 (1980). A bench conference immediately following the instructions in the instant case reveals that both the defense counsel and the judge were under a misapprehension as to the effect of proof of the intentional use of a deadly weapon in the commission of a homicide. The prosecutor correctly and appropriately brought to the judge's attention the critical distinction between inferences and presumption in the following colloquy:

THE PROSECUTOR: "The only thing I was interested in was that you tell the jury that malice may be inferred when the killing is the result of an intentional use of deadly force."

THE JUDGE: "I covered that, too. When the killing is caused by the intentional use of a deadly weapon there arises a presumption of malice aforethought."

DEFENDANT'S COUNSEL: "Right."

The prosecutor twice again sought to alert the judge to the error before acquiescing in the instruction as given. We note also that included in the defendant's requested instructions on the elements of murder in the second degree was the following: "Every sane person is presumed to intend the natural and probable consequences of his acts. However, a specific intent is required as an element of the crime charged, so no inference of such intent may be drawn from the mere proof of the act." The requested instruction would be needlessly confusing to a jury. Our recent decisions in this area offer sufficient guidance to allow the formulation of clear and precise instructions on the inference which may permissibly be drawn from the intentional use of a deadly weapon in cases of homicide.

the weight of the evidence and consonant with justice. As to the first point, the Commonwealth clearly produced evidence sufficient to support a finding of murder in the second degree. Four witnesses testified that Repoza was at the scene of the killing armed with a knife. Zenalia Vargas, Carlos Vargas' mother, testified that the knife found near the scene of the crime, and identified as the one in the defendant's possession, did not come from her house. The clear inference from her testimony is that Repoza arrived at the party armed. Carlos Vargas testified that the defendant approached him with the knife, then said, "No, this is your party"; from this exchange, the jury could have inferred that the defendant was willing to use the knife offensively, and not merely defensively, once the trouble started. Both Trevisone and Poplawski gave eyewitness accounts of the stabbing. Poplawski's testimony on cross-examination was particularly damaging. He stated that after the incident on the stairs, Repoza fled down the travelled surface of Concord Avenue while Grogan ran on the sidewalk. From this testimony, the jury could have concluded that John Grogan did not stand in the defendant's natural route of escape, but that Repoza rather deviated from the shortest course to safety to strike the fatal blow.

Having considered this case as to the law and the evidence as we are required to do under G. L. c. 278, § 33E, we decline to grant the defendant a new trial or to direct the entry of a verdict of a lesser degree of guilt than that found by the jury.

Judgment affirmed.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT
Of The
UNITED STATES
October Term 1987
No. 87-485

MASSACHUSETTS,
Petitioner

v.

RICHARD REPOZA,
Respondent

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS AND FOR COUNSEL TO APPEAR PRO HAC VICE

Now comes the Respondent, Richard Repoza Pro Se, and moves the Supreme Court of the United States to allow him to proceed in forma pauperis status, waiving filing fee's for the opposition, filed herewith, and costs of printing briefs and expenses if this Court grants Petitioners Petition for a Writ of Certiorari and sets the case for briefing and argument.

In support of this motion Respondent files his attached affidavit showing he is an indigent prisoner unable to pay the costs of the opposition, fee's, printing costs and cousels' costs.

If Petitioner's Petition is allowed, Respondent also requests the Supreme Court to allow Attorney Bernard Grossberg, 141 Tremont Street,Boston, MA. 02111 (617) 423-7070, to appear for the Respondent Pro Hac Vice.

RESPECTFULLY SUBMITTED,

September 21,1987

RICHARD REPOZA PRO SE
P.O. Box 100 (MCI Cedar Junction)
South Walpole,MA. 02071

In The
SUPREME COURT
Of The
UNITED STATES
October Term 1987
No. 87-485

MASSACHUSETTS,
Petitioner

v.

RICHARD REPOZA,
Respondent

RESPONDENT'S AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, Richard Repoza, Pro Se, hereby depose and state the following facts of my own personal knowledge, under the pains and penalties of perjury, to be true:

1) I have been imprisoned for the past nine years, under a criminal conviction for murder in the Second Degree, after trial by jury for a charge of Murder in the First Degree,
2) My conviction was reversed by the Massachusetts Supreme Judicial Court on July 23,1987, and the state of Massachusetts has filed a petition for a writ of certiorari in the Supreme Court of the United States; I am the respondent in that action,and am filing this affidavit with respect to my opposition thereto,
3) My prison savings account contains One Hundred and Eighty Dollars, and my prison personal account contains Six Dollars,

4) I have no other bank accounts or real assets and I own no real property, other than my clothes and a television set in my prison cell,

5) I own no vehicles, no bonds or insurance policies, or other property of value,

6) I do not have a prison job and have not been empoyed in prison industries for the full nine years of imprisonment, and have not been otherwise assigned (except for school) for the past year, (& 3 weeks storehouse @ $1.00 per day for $21.00)

7) I do truthfully expect to have a job upon my release on bail, but I presently owe an Attorney at least $500.00 for his assistance in having a bail hearing held,

8) At the state level, I appeared pro se in the Appeals Court and the Supreme Judicial Court, and in a post-conviction motion in the Superior Court (See Decision in Petitioners appendix),

9) I have been allowed to proceed in forma pauperis status by the state Court's of Massachusetts with respect to the decision presently before the Supreme Court of the United States,

9) I cannot pay filing fee's, printing costs, or Attorney's fee's for opposing the state's Petition for certiorari in your Court,

Respondent swears under oath that all of the foregoing is absolutely true and correct, subject to the pains and penalties of perjury; and requests that he be allowed forma pauperis statis for his opposition,

RESPECTFULLY SUBMITTED,

Richard Repoza

September 21,1987

RICHARD REPOZA PRO SE
P.O. Box 100
South Walpole,MA. 02071

NO: 87-485

In The
SUPREME COURT OF THE UNITED STATES
October Term 1987

MASSACHUSETTS,
Petitioner

v.

RICHARD REPOZA,
RESPONDENT

RESPONDENT'S OPPOSITION TO THE STATE OF MASSACHUSETTS PETITION FOR A WRIT OF CERTIORARI

By,

RICHARD REPOZA PRO SE
Post Office Box 100
South Walpole,MA. 02071

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QUESTIONS PRESENTED

I. WHETHER MASSACHUSETTS GENERAL LAW CH. 265, § 1, WHICH LEGISLATIVELY DICTATES THAT "THE DEGREE OF MURDER SHALL BE FOUND BY THE JURY" PRECLUDES A ROSE V. CLARK HARMLESS ERROR REVIEW ON AN ADEQUATE AND INDEPENDANT STATE GROUND, OR IN THE ALTERNATIVE WHETHER RESPONDENT'S INVOKING ARTICLE III, SEC. II AND SIXTH AMENDMENT PROTECTIONS IN THE COURT BELOW AND THIS COURT, PRECLUDES A HARMLESS ERROR REVIEW ?

II. WHETHER THE SUPREME JUDICIAL COURT'S FINDING, AFTER REVIEW OF THE RECORD FACTS, THAT RECORD EVIDENCE WAS CONSISTANT WITH A MANSLAUGHTER VERDICT, WAS FULLY CONSISTANT WITH THIS COURTS DECISION IN ROSE V. CLARK ?

III. WHETHER REVIEW OF THE CHALLENGED INSTRUCTIONS WHICH FOUND TWO SEPERATE MANDATORY CONCLUSIVE PRESUMPTIONS OF INTENT TO KILL AND ONE REBUTTABLE PRESUMPTION OF MALICE, WHEN CONSIDERED WITH A TOTAL CHARGE REVIEW SHOWING A FLAWED PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF INSTRUCTION, CORRECTLY INTERPRETED THIS COURTS DECISIONS IN: IN RE WINSHIP, MULLANEY V. WILBUR, UNITED STATES V. UNITED STATES GYPSUM CO., SANDSTROM V. MONTANA, CONNECTICUT V. JOHNSON, VIA FRANCIS V. FRANKLIN ?

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In The
SUPREME COURT OF THE UNITED STATES
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MASSACHUSETTS,
Petitioner

v.

RICHARD REPOZA,
Respondent

RESPONDENT'S OPPOSITION TO THE STATE OF MASSACHUSETTS PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The Opinion of the Mass. Appeals Court finding two conclusive presumptions of intent to kill and one rebuttable presumption of malice is attached in Respondent's appendix C. The decision of the Massachusetts Supreme Judicial Court reversing the conviction and granting a new trial is reprinted in Petitioners Appendix A.

Jurisdiction

Petitioners designated jurisdiction pursuant to 28 U.S.C.,§ 1257(3). Respondent opposes the granting of certiorari and invokes an adequate and independant state ground, plainly set out in the n. 1/ decision below as possibly barring jurisdiction, and asserts, as he did below, that Article III, Sec. II and the Sixth Amendment to the Constitution of the United States bar jurisdiction under the specific facts of this case, for any harmless error review by any appellate court.

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n. 1 / Massachusetts General Law,Chapter 265, Section 1

CONSTITITIONAL PROVISIONS INVOKED BY RESPONDENT IN THE COURT BELOW AND IN THIS COURT

ARTICLE III, SECTION II: (third paragraph)

"The Trial of all Crimes except in case of impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed;

(in pertinent part) (emphasis added)

THE SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....."

(in pertinent part) (emphasis added)

THE FOURTEENTH AMENDMENT:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISION CITED IN OPINION BELOW

Massachusetts General Law Ch. 265, § 1:

"The degree of murder shall be found by the jury."

(in pertinent part)(emphasis added)
SEE: REPOZA II, 400 Mass 516, at 522 note 7 (1987)

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The "fight" which precipitated the killing in this case (See n. 3 infra), occured during and after a High School granduation party(T. 2:p.39).

Fifteen Somerville boys attended (T. 2:p.58), and six or seven Cambridge boys attended (T. 2: 53-54;124). Respondent Richard Repoza was one of the boys (and girls) who attended from Cambridge Massachusetts (T. 2:p. 53-54), uninvited.

Officer Michael F. Gaugan found a "small" steak knife (T. 4:p.73) which the prosecution used as the weapon in the case and which was marked as Exhibit no. 8(T. 4:p.74). The "steak knife" was three-quarters of an inch wide, beginning to taper two inches from the handle (T. 5:p.72).

The victim (John Grogan) was killed by a "single" stab wound (T. 5: 96-97) according to Doctor Leonard Atkins. A knife hit the one half inch intercostal space between the ribs and perforated part of a rib (T. 5:p. 102). The wound in the victim was one and a half inches wide and at least three inches deep (T. 5:p. 97).

The victim (John Grogan) had consumed approx. 36 to 40 ounces of beer in the 40 minutes prior to his death according to Doctor Atkins (T. 5:p. 94)

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* The record transcript filed and reviewed by the Supreme Judicial Court in the decision below (See Docket entries R-App E) will be cited by volume: page (T. ____: p.____)

The party occured at the home of Carlos Vargas (T.2:p.39)(The sworn testimony at the P.C. hearing of Carlos Vargas, filed in respondents' record appendix below shows the steak knife came from the Vargas Homes kitchen,SJC Appendix pp.68)).

Richard Trevisone, 19 years old (T. 2:p.103) (the main state witness) had finished 1½ years of Karate training prior to the killing and had reached the level of 1st brown belt(T. 3:p.11)testified he chased Richard Repoza past John Grogan, who was then fighting a third party (T. 2:p.189) while Grogan(the victim) hit the third party at least three times (id). n. 2 /.(T. 2: 189 through 3:p. 8)

State Police Officer Kenneth Gagnon stated (at the bench and on voire dire) that he had the clothes of the victim John Grogan and a liquor Identification Card no. 2142 from the body of the deceased (John Grogan) which had the picture of the victim John Grogan on it, bearing the name of Richard Trevisone (T. 5:p.54)

John Cavallaro testified before the jury, for the prosecution, that he observed four kids chasing Richard Repoza (T. 4:p.179) and that John Grogan (the victim) was on top of a pile of people (who had been fighting), came out of the pile, holding his chest, staggered and fell (T. 4:p. 168--171).

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n. 2 /The sworn P.C. testimony of Richard Trevisone, filed with the SJC below(SJC Appendix p.27,29,56,57) in the record below w/re improper impeachment by counsel, shows Trevisone stated Grogan grabbed or tried to grab Respondent Richard Repoza, in his first testimony and initial statements to the Police.

Trevisone's trial testimony related to respondent punching or stabbing the victim (Grogan) as he passed him.

John Cavallaro testified before the jury that the four kids in the pile were Respondent Richard Repoza, prosecution witness James Poplowski, Joey Long, and that the victim John Grogan was in the pile, came out of the pile (clutching his chest T. 4:p. 168-171) and fell (T. 5:p. 6-7).

Carol Fredericks testified that Richard Repoza was at the party dancing with Lynn Walsh and that she danced with him once (T. 7: p.11-12). According to Miss Fredericks Respondent was at the party, dancing and talking with people without any problems (id). Karen Reardon testified similarly, however she additionally testified that Respondent Richard Repoza and Kathleen (presumably Owens), tried to break up a fight (T. 6:p. 176). Kathleen Owens contradicted the states case by testifying that "she didn't see anything" in Richard Repoza's hands at an earlier incident on the stairs(T. 6:p.114).

This contradicted Petitioners facts on the point (according to Richard Trevisone & James Popalowski; Richard Repoza had a steak knife on the porch, earlier, when Trevisone grabbed (Respondent) Richard Repoza by the neck and brought him into the street (T. 2:p. 110,176). Poplowski jumped into the Trevisone-Repoza incident on the porch and stated "If you want to fight someone with a knife, fight me."(T. 2:p.176)

Respondent Repoza's reply to this was to withdraw (T. 2:p.177).

Robert Devereaux, age 18, of Somerville, Massachusetts, testified that he started the first fight with Joey Long(T. 7:p.22) and denied he assaulted and battered Carol Fredericks and Karen Reardon (T. 7: 25-28). When Judge Tamurielo commented on the many "fights" at the bench, defense counse (Respondent's trial counsel) protested "Your Honor, how can we show a defense of self-defense, or possible accident, or possible not even him, if we can't even show the condition of what was going on that night was atrocious, it was mayhem ?"(T. 6: 163).

Respondent's counsel brought out the "fighting" that was going on at the time of the victims(John Grogan')death from a single stab wound on no less than two-hundred and eighteen occassions, before the jury n. 3 /.

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n. 3 / The fighting continued through the time of the victims death and thereafter, including both Trevesone and Polowski eventually injuring at least the respondent through kicks and blows. T. 2:pp. 54,55,63,67,68,69,73,79,80,83,84,86,87,88, 89,107,118,144,154,157,159,162,163,164,165,166,167, 172,174,176,177,183,184,189,190,191; Vol. 3:pp. 93, 94,96,126,129,130,131,132,133,136,138,141,149,162, 163,164,165,167,166; Vol. 4:pp. 6,15,16,25,45,46,47, 65,90,91,92,94,116,117,124,137,138,147,149,150,151, 152,153,154,155,156,159,160,162,162,164,168,169,171,174, Vol. 5:pp.7,8; Vol.6:pp. 78,94,97,109,110,111,112, 113,116,117,159,172,160,174,175,177,178,179,180; Vol 7:pp. 22,23,24,28,31,32,33,34,56,58,59,60,65, 67,68,69,70,71,72A,90,95,96,98,99,100,102,104,105, 107,108,109,110,112,151,152,153,154,155,163,164,165, 166,167; Vol 8:pp. 6,7,8,9,10,13-18(13-18 are records of Respondent's injuries).As specifically set out in Respondent Repoza's Primary Supreme Judicial Court brief consisting of 19 pages and reply brief consisting of an additional 9 pages of facts;making a total of 28 pages in only statement of facts,not counting 70 additional pages of argument before the Massachusetts Supreme Judicial Court.

Mrs Rachel McBrine (who lived near the Vargas Home where the party occured and on the street overlooking the scene of the death) testified that she observed an awful lot of boys running wild and one of them pulling a picket off the fence, real fast (T. 7:p. 149) She then went to her porch (7:150) where, as she testified on at least four occassions, she observed three boys fighting, struggling , then one boy (the victim) walked away from the other two, into the street--bent over and fell; she later went to this boys' side in the street, where she saw the three boys fighting and struggling, where the victim John Grogan now lay dead (T. 7: p. 151-155,163,164--167). After this the other two boys "took off running" in the direction of Beacon Street (consistant in part with the prosecutions theory of Trevisone chasing respondent Repoza)(T. 7:p. 165-166).

Respondent's trial counsel placed each and every element of the offense at issue in his opening statement to the jury:

> "We are going to try to disprove everything that the prosecution says." (T. 2:p.35) n.4 /
>
> "The defense will try and show that there were many fights going on; that each of the witnesses that the prosecution has that claim they saw something, we are going to try and show that they were involved in scuffles of their own.Indeed, scuffles,believe me, there were -- or, we will try to show that they were more than scuffles. They were fights, serious fights." (T. 2:p.36)
>
> "True, as a result of these fights a young boy was killed, and everyone is sorry for that,both the witnesses for the Commonwealth and the witnesses for the defense."(T. 2:p.36)

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n. 4 /"We note that a defendant in a criminal trial is justified, of course, in defending solely in reliance on the presumption of innocence and the state's burden of proof." CONNECTICUT V. JOHNSON, 460 U.S. 73,87 n.16(1983)

Respondent's trial counsel did not use the word murder at trial (entire record) and in closing argument (along with disputing identity), argued for a manslaughter verdict at most:

> "Is it more consistant with a fight ? Is it more consistant with what Mrs. McBrine said ?" (T. 9:p.15)
>
> "The most important witness in this whole case was Mrs. McBrine...,and there were three boys fighting...,And suddenly she sees Grogan stand up, lean back, stagger across the street and fall." (T. 9:p.18)
>
> "And if you recall members of the jury,I asked, 'Did anybody run by ?' And her answer was, 'No'."
>
> "Are we to say that she has a reason for saying it ? She has nothing to gain. She is impartial. (T. 9:p.18)

The state trial judge's instructions to the jury included two mandatory 'conclusive' presumptions of intent; one rebuttable presumption of malice, flawed presumption of innocence and burden of proof instructions; and an instruction indicatating that (although no motion for a directed verdict of not guilty was filed) the trial judge had determined personally that there was sufficient evidence to convict the defendant:

> "Even if he (the defendant) only intended to wound, in law he is presumed to have intended to kill." (T. 9:p.78-79)
>
> "Whenever a person intentionally sets in motion against another a force which, according to the common experience of mankind, is liable to kill and death does result, that person is deemed in law to have intended to kill."(T. 9:79)

"And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice."(T. 9:70)

"However, the circumstances which attend to killing may be shown to rebut the presumption by showing circumstances which, although they do not excuse the killing, might mitigate it from the crime of murder to manslaughter." (T. 9:p.70) n. 5 /

On The Presumption of innocence:

"This presumption does not run with the defendant through the trial, but it continues with him through the trial until you receive evidence to the contrary."(T. 9:p.46)

On Reasonable doubt:

"A reasonable doubt is a valid doubt, a strong doubt." (T. 9:p.49)

On (Respondent does not know what to term this jury instruction) n. 6 /

"He is entitled to have a verdict of not guilty ordered by the Court unless the evidence is sufficient to warrant a finding by the jury that he is guilty beyond a reasonable doubt."(T. 9:p. 45)

No language concerning an 'inference' of malice or intent is present in the total jury instruction, and the trial Court linked malice to intent to kill in his instructions just following the challenged presumption of malice on seven seperate occasions (T. 9:p.71--74). The trial Court instructed the jury that they must accept the Court's pronouncement of the law,without question, on six seperate occassions(T. 9:35,36,37,38).

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n. 5 /These instructions which included two conclusive presumtions of intent not adressed in Repoza I, were specifically set out in the Pro Se motion and affidavit in the Superior Court and Judge Zobel's decision thereon(Appendix D); found to form 'concusive mandatory presumptions by the

(continued next page)

n. 6 /The trial judge may have been instructing the jury that he (the Court) had already found sufficient evidence to convict the respondent?

I. PETITIONER'S PURPOSEFUL OMMISSION OF THE LOWER COURTS CITATION TO M.G.L. CH. 265, § 1, SUPPORTS THIS COURT'S DENIAL OF CERTIORARI ON AN INDEPENDANT AND ADEQUATE STATE GROUND

Petitioner, The State of Massachusetts, purposefully ommitted the Supreme Judicial Court's citation to Massachusetts General Laws, Chapter 265, Section 1, on pages 6 and 7 of the Petition for a Writ of Certiorari.

This Court, or a majority of the justices thereof, may vote to refuse to review a decision which rests upon an adequate and independant state ground, MICHIGAN V. LONG, 463 U.S. 1032, 1038-1042,note 7 (1983); FOX FILM CORPORATION V. MULLER, 296 U.S. 207,210 (1935).

In Commonwealth V. Repoza II,* (Pet.App A) 400 Mass 516, at 522,510 NE2d 755,758 (1987), the Massachusetts Supreme Judicial Court held:

> "Thus, the impermissible presumption language may have made a difference between a verdict of not guilty, guilty of murder in the second degree, or of manslaughter, a verdict which was consistant with the evidence and on which the judge instructed."

On the same page of the decision below, in footnote 7, the Supreme Judicial Court went on to explain:

> "However, under G.L. c. 265, § 1, the degree of murder is for the jury."

Petitioners purposefully ommitted this portion of footnote 7 from their quotation (Pet. for cert. pp. 7-8) of the decision below.

n. 6 /Cont. Massachusetts Appeals Court in REPOZA II;(sub nom) unpublished decision (Appendix C), upon which the Supreme Judicial Court based it's decision in REPOZA II(Pet. App. A ;p.2a) that the judges instructions considered in REPOZA I, "did not cure the possibility that, 'in light of the instructions on intent given in this case.....'"REPOZA II, 400 Mass 516, at 521 (1987)

* Hereinafter cited as Repoza II.

In the first instance, because ROSE V. CLARK, 106 S.Ct. 3101 (1986) dealt with distinguishable facts in a case concerning both 1st and 2nd degree murder convictions, Repoza II's facts which concern manslaughter and a challenged conviction for 2nd degree murder, either (i) do not fall under the holding of ROSE V. CLARK or (ii) are distinguishable under the primary holding of MULLANEY V. WILBUR. To paraphrase MR. JUSTICE HARLAN speaking in IN RE WINSHIP, 397 U.S. 358,372 (1970):

> "(I)t is far worse to sentence one guilty only of manslaughter as a murderer; than to sentence a murderer for the lesser crime of manslaughter."
>
> MULLANEY V. WILBUR, 421 U.S. 684,703-704 (1975)

On an appeal concerning error in jury instructions, Massachusetts correctly holds that where:

> "(t)he evidence is conflicting, it is for the jurors, not the court to decide the factual dispute."
>
> Commonwealth V. Fernette, 398 Mass 568, at 672 500 NE2d 1290 ,1299 (1986)(JUSTICE ABRAMS,J.)

This correct holding is embodied in the legislative dictate of Massachusetts General Law, Chapter 265,§ 1.:

> "The degree of murder shall be found by the jury."

Where a judgment of a state court rests upon two grounds, one of which is nonfederal and one of which is federal, a majority of the justices of this Court may find there is no

jurisdiction to review the decision below, FOX FILM CORPORATION, supra; KLINGER V. MISSOURI, 13 Wall 257,263 (1872).

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights, And our power is to correct wrong judgements, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgement would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."
>
> HERB V. PITCAIRN, 342 U.S. 117,125-126 (1945)

The 'plain statement' of the Massachusetts Supreme Judicial Court concerning:(a) record evidence consistant with a verdict of manslaughter, and (b) application of M.G.L. Ch. 265,§ 1, to review of the highly disputed facts of the case, support your Respondent's suggestion that this Court, and a majority of the individual justices thereof, should vote to deny certiorari.

The decision was correct and the Massachusetts Supreme Judicial Court did not feel "compelled by what it understood to be federal constitutional considerations to construe..... its own law in the manner it did." ZACCHINI V. SCRIPTS-HOWARD BROADCASTING CO.,433 U.S. 562, 568 (1977).

II. THE MANDATORY CHARACTER OF TWO SEPERATE CONCLUSIVE PRESUMPTIONS OF INTENT TO KILL REINFORCED THE REBUTABBLE PRESUMPTION OF MALICE AND THE DECISION BELOW IS FULLY CONSISTANT WITH THIS COURT'S HOLDING IN FRANCIS V. FRANKLIN

Petitioner, the state of Massachusetts, again misrepresents record facts in the hope of winning certiorari in an individual case.

The decision in REPOZA II is based on Respondent's challenge, at all levels of this case, to two seperate mandatory conclusive presumptions of intent to kill and one rebuttable presumption of malice (See appendix's C & D).

1) "Even if he only intended to wound, in law he is presumed to have intended to kill."

2) "Whenever a person intentionally sets in motion against another a force, which according to the common experience of mankind, is liable to kill and death does result, that person is deemed in law to have intended to kill." (T, 9:78-79)

3) "And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice."
.....
However, the circumstances which attend the killing may be shown to rebut the presumption ....." (T, 9:p. 70)

These instructions, found to form mandatory conclusive presumptions, by the Massachusetts Appeals Court (Appendix C), n. 7 /, clearly violate this Courts' holdings in both FRANCIS V. FRANKLIN,471 U.S. 307 (1985), CONNECTICUT V. JOHNSON, 460 U.S. 73,83-84 (1983) and SANDSTROM V. MONTANA, 442 U.S. 510,521-523 (1979).

n. 7 /The Mass. Appeals Court's unpublished decision appears to have been an unauthorized dissent from the first decision in Commonwealth V. Repoza I,382 Mass 119, 414 NE2d 591(1980) hereinafter refered to ar Repoza I.

The 1986 Massachusetts Appeals Court decision in REPOZA II, 22 Mass Appeals Ct. 1110 (1986)(unpublished) held that, when reviewing the total context of the charge as a whole, FRANCIS V. FRANKLIN, 471 U.S. at 315, could have been understood by a reasonable juror "to eliminate any form of manslaughter" (Appendix C:pp.13).

Because:

> "(T)he presumption of innocence is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases."
> 9 Wigmore, EVIDENCE, § 2511 p. 407 (3rd Ed. 1940)

The instruction, in the instant case which, in effect , stated that the presumption of innocence does not run with the defendant throughout the trial, further added weight to the conclusive effect of the burden shifting instructions (T. 9:p. 46).

The 'burden of proof instruction' was similarly flawed when it stated that:

> "A reasonable doubt is a valid doubt, a strong doubt." (T. 9:p. 49)

Please see: DUNN V. PERRIN, 570 F2d 21,24 (1st Cir. 1978) cert. denied, 437 U.S. 910 (1978); cf SMITH V. BORDENKIRCHER, 718 F2d 1273,1278-1279 (4th Cir. 1983);TAYLOR V. KENTUCKY, 436 U.S. 478, at 488 (1978).

Finally, the judge placed his thumb on the scales of justice by instructing:

> "He is entitled to have a verdict of not guilty ordered by the Court unless the evidence is sufficient to warrant a finding by the jury that he is guilty beyond a reasonable doubt."(T. 9:p.45) n. 8 /

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n. 8 / In a total charge analysis respondent pointed to a total of 23 seperate flaws in the jury instructions evaluated by the Court below.

This, unique, instruction implied a message to Respondent's jury, quite uncorrectly n. 9 /, that the Court had already personally found sufficient evidence to convict your Respondent, beyond a reasonable doubt.

This Court may agree that Massachusetts law controls the point as to whether intent may be an element of malice murder, ROSE V. CLARK, 106 S.Ct. 3101,3109 note 13 (1986). Massachusetts does hold that intent to kill is one form of malice murder, Commonwealth V. Grey, 399 Mass 469 n. 10/ 505 NE2d 171 (1987); cf. Commonwealth V. Repoza II, 400 Mass 516,522 note 7 (1987) (Appendix A:p. 7a). In addition Respondent's judges instructions to the jury required respondents' jury to find malice if they found an intent to kill (T. 9:p.70-74).

> "It has long been settled that when a case has been submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." Stromberg V. California, 283 U.S. 359 (1931); Leary V. United States, 395 U.S. 6, 31-32 (1969); Ulster County Court V. Allen, 442 U.S. 140,159-160 n.17 (1979); Bachellar V. Maryland, 397 U.S. 564,570-571 (1970); United Brotherhood of Carpenters and Joiners V. United States, 330 U.S. 395,408-409 (1947); Bollenbach V. United States, 326 U.S. 607,611-614 (1946); SANDSTROM V. MONTANA, 442 U.S. 510,526 (1979); Accord, FRANCIS V. FRANKLIN, 471 U.S. at 323 n.8 (1985)

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n. 9 / This single erroneous phrase, even in the absence of an objection, is held to require reversal and a new trial, GORE V. STATE, 522 A2d 1338, at 1342-1343 (1987)

n. 10 / Also See Commonwealth V. Lennon, 399 Mass 443,447 n5,504 NE2d 1051,1054 n.5 (1987); Commonwealth V. Callahan, 380 Mass 821,822, 406 NE2d 385,386 (1980(Tamburello,J)

The erroneous instructions, upon which the Massachusetts Supreme Judicial Court decision below rests, form mandatory 'conclusive presumptions' of intent to kill and malice, which have been considerered by this Court on three prior occassions, MORISSETTE V. UNITED STATES, 342 U.S. 246 (1952), UNITED STATES V. UNITED STATES GYPSUM CO.,438 U.S. 422 (1978),CONNECTICUT V. JOHNSON, 460 U.S. 73 (1983).

The opinion below is based on the conclusive presumptions of intent to kill:

> "Language explaining the presumption of innocence and the Commonwealth's burden of proof, and stating that "(a)ll the presumptions of law independant of evidence are in favor of innocence,"Repoza I,supra at 134, did not cure the possibility that, "(i)n light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of (stabbing the victim) */ and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise," Francis supra at 319. Clearly, the instructions at trial do not meet the requirements of Francis."
>
> REPOZA II, 400 Mass 516, at 521-522 (1987) (Appendix A:p. 6a-7a)
>
> */indicates inserted by S.J.C. in decision (stabbing the victim)

This clearly indicates that the Court below completely followed this Court's ruling in FRANCIS.

The mandatory irrebuttable conclusive presumptions in REPOZA II simultaneously and independantly: 1) presented error less susceptible of dilution than that creating the rebuttable presumption, 2) heightened the force of the rebuttable presumption; and 3) by sapping the force of general language on the burden of proof and inferences, made impossible any effective dilution of the presumption.

The Massachusetts Supreme Judicial Court, in deciding to grant a new trial, merely recognized the fact that:

> "Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the function of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by Court and Jury." MORISSETTE V. UNITED STATES, 342 U.S. 246,274(1952)

Respondent's judge could not direct a verdict of guilty nomatter how conclusive he incorrectly thought the evidence was, BUSHELL'S CASE, 124 Eng. Rep. 1006,1010 (C.P. 1670);UNITED BROTHERHOOD OF CARPENTERS AND JOINERS V. UNITED STATES, 330 U.S. 395,408 (1947); UNITED STATES V. MARTIN LINEN SUPPLY CO., 430 U.S. 564,573 (1977); CONNECTICUT V. JOHNSON, 460 U.S. 73,83 (1983), nor could he remove any factual issue from the jury's consideration, UNITED STATES V. UNITED STATES GYPSUM CO., 438 U.S. 422,435-438,464-465 (1978); DeCECCO V. UNITED STATES, 338 F2d 797 (1st Cir. 1964); UNITED STATES V. BENEDETTO, 558 F2d 171,176-177 (3rd Cir. 1977);UNITED STATES V. JOHNSON, 718 F2d 1317,1321-1323 (5th Cir. En Banc 1983); FRANCIS V. FRANKLIN, 471 U.S. 307 (1985).

Respondent's trial judge, in effect, violated both of these fundamental proscriptions and the decision below, considering the total jury instruction, is absolutely correct.

III. THIS COURT SHOULD NOT REEXAMINE ROSE V. CLARK IN LIGHT OF THE CONCLUSIVE PRESUMPTIONS AND RECORD FACTS WHICH ARE CONSISTANT WITH MANSLAUGHTER IN "MASSACHUSETTS V. REPOZA"

Although Superior Court Judge Zobel's addressing Respondent's challenge to mandatory and conclusive presumptions on the merits resurected the issue as if it were on direct appeal, Commonwealth V. Miranda, 22 Mass. App. Ct. 10, n. 11/ 490 NE2d 1195,1200(1986) citing Commonwealth V. Buckley, 17 Mass App. Ct. 373,374, 458 NE2d 781 (1984) and many other cases, and Respondent's reliance on the prosecutor's objecting on four occassions to the challenged 'presumption' language, served as a contemporaneous objection on the defendant's behalf,combined with Respondent's argument of actual innocence below, MURRAY V. CARRIER 106 S.Ct. 2639, at 2650 (1986) and KUHLMANN V. WILSON, 106 S.Ct. 2616,2627 (1986) with a modified intervening decision position, StPIERRE V. HELGEMOE, 545 F2d 1306,1308-1309 (1st Cir. 1976) 'ends of justice', SANDERS V. UNITED STATES, 373 U.S. 1, 16-17 (1963)/ 'plain error' position,BASS V. WAINWRIGHT, 675 F2d 1204,1207 (11th Cir. 1982), may place respondent's case in a position to distinguish ROSE V. CLARK on the facts, this Court should not reexamine ROSE V. CLARK in light of conclusive mandatory presumptions and record facts supporting a not guilty or manslaughter verdict.

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n.11 /Accord with, Commonwealth V. Harrington, 379 Mass 446,449 (1980)

The Massachusetts Supreme Judicial Court simply made a mistake in Repoza I, as shown by the Pro Se appellant in Repoza II, (i) becomming the first Pro Se criminal defendant in history to ever win his own murder appeal in the Mass. S.J.C., (ii) and, becomming the first criminal litigant in 200 years of Supreme Judicial Court decisions to overcome the "law of the case doctrine" and 'stare decisis'.

The Petitioners, the state of Massachusetts, totally refused to cite or n.12 / argue ROSE V. CLARK, supra, in the Supreme Judicial Court when respondent submitted it on 12 seperate citations(both majority and dissenting opinion) to the Supreme Judicial Court directly and when Respondent pointed out Petitioner's avoidance of the decision on fourteen occassions ,again, in his S.J.C. Reply brief.

In the Court below, Petitioners, the state of Massachusetts, argued that any error was harmless because they submitted the defendant did not dispute that a murder occured. Their brief will be filed by Respondent in the Supreme Court Clerk's office, should any individual justice wish to examine Petitioner's janus faced position in this Court (Stern & Gressman, SUPREME COURT PRACTICE, p. 577 (Fifth Ed. 1978) suggests that a pro se litigant may place briefs or exhibits with the clerk in this manner, should a Supreme Court justice wish to examine an exhibit or brief).

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n.12 /Petitioners could have, but did not, move for a rehearing on their new ROSE V. CLARK position,in the Massachusetts Supreme Judicial Court. Instead, they seek a second bite of the apple in this Court, to delay and prejudice Respondent's retrial, and his ultimate release or acquittal.

One point requires respondent's careful explanation to the Justices of this Court.

In Repoza I the facts barely sustained a conviction of 2nd degree murder, when appointed counsel argued a presumption of malice was correct both at trial (prior to Sandstrom) and on appeal after Sandstrom was decided.

However, a lower court with a jaded view could consider the Repoza I facts in light of the rule that: (Respondent does not suggest they will)

> "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest of fairness has been satisfied and the judgment should be affirmed."
> (Majority opinion) ROSE V. CLARK at 3107.

In the Massachusetts Supreme Judicial Court (and previously to some extent in the appeals Court) your Respondent followed MR. JUSTICE BLACKMUN's,MR. JUSTICE BRENNAN'S and MR. JUSTICE MARSHALL's dissenting opinion n. 13/ in ROSE V. CLARK, at 3113-3116 (1986)

In Repoza II, the Massachusetts Supreme Court, or six of the seven members thereof (Repoza I was only a five member panel, and Respondent changed 4 of the Repoza I's panel's mind in Repoza II), found that, not a murder but, a manslaughter verdict was consistent with the record evidence (or a not guilty verdict). This position was correct.

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n.13 /Respondent alternatively argued that he was entitled at a minimum to a full record harmless error review, but suggested Art. III,sec.II and the Sixth Amendment required per se reversal.

Because the record facts in MASSACHUSETTS V. REPOZA clearly expose the majority holding in ROSE V. CLARK as bad law, n. 14/ consistant with the correct position of JUSTICES BLACKMUN, BRENNAN and MARSHALL's dissent on the point that:

> "A trial that was fundamentally unfair at the time it took place, because the jury was not compelled to perform its constitutionally required role, cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence."
>
> id. at 3113.

this court should not grant certiorari.

The facts of Respondent's case clearly and conclusively show that "The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under (Art. III, sec. II and,) the Sixth Amendment can demand be performed by a jury." id. at 3114.

> "Whether such an act was done in such or such a mannor, or to such and such an intent, the jurors are judges. For the Court is not judge of these matters, which are evidence to prove or disprove the thing in issue."
>
> J. Hawle, THE ENGLISHMAN'S RIGHT, A Dialoque Between a Barrister at Law and a Jury-Man, 8 (1680)

> "A man cannot see by another's eye; nor hear by anothers' ear; no more can a man decide and infer the thing to be resolved by anothers' understanding or reasoning."
>
> BUSHELL'S CASE, 6 How St.Tr. 999;Vaughan at 148; 124 Eng. Rep. 1006,1010 (C.P. 1670)
>
> quoted in COMMONWEALTH V. ANTHES, 5 Gray (71 Mass) 185, at 211 (1855)

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n. 14 /Evidently this bad law spreads and swarms into the 6th Circuit with the decision in DAVIS V. JABE, 824 F2d 483, at 488 (1987) where on July 23, 1987, that Court held that a ROSE V. CLARK, harmless error sufficiency of the evidence review surpasses the Compulsory Process Clause of the Sixth Amendment holding in WASHINGTON V. TEXAS, 388 U.S. 14,16(1967). This Court should act promptly to stop the spread of this "sufficiency of the evidence" harmless error doctrine before the exception swallows the rule.

The framers of our Constitution saw fit to incorporate this quintessential right into both Article III,Section II and the Sixth Amendment of the Constitution of the United States, UNITED STATES V. JOHNSON, 718 F2d 1317,1320 (5th Cir. En Banc 1981). As the Justices of the Massachusetts Supreme Judicial Court know:

> "Ad quaestronem facti non respondeat judices, ad quaestronem legis non respondent juratores, literally taken is true, for if it be demanded: What is the fact ?; the judge cannot answer it; if it be asked, What is the law in the case ?; the jury cannot answer it."
> COMMONWEALTH V. ANTHES, supra at 211,219 (1855)

Respondent suggests that the most essential feature of the right to trial by jury, which has been recognized for hundreds of years, is that the jury decides all ultimate questions of fact concerning the offense allegedly committed,J. Thayer, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW,183-189 (1898); J. Vanderbuilt, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION, § 111, at 51-54 (1958).

Respondent suggests that this conclusively crystal clear distinction between the roles of judge and jury-man, which does not permit a judge to interfere with the judges unfettered discretion to decide all ultimate facts in a criminal case, was carefully and rightfully guarded by English Law, W. Forsyth, HISTORY OF TRIAL BY JURY, Ch. XII, § 11, at 235 (1875); and has long been viewed as

an essential component of the Constitutional rights guarded by the Sixth Amendment, UNITED STATES V. BATTISTE, 24 Fed Cas 1042,1043, 2 Sumner 240,243 (C.C.D. Mass. 1835)(Story,J.). This right is"fundamental to our system of justice", DUNCAN V. LOUISIANA, 392 U.S. 145,149 (1968)

Your respondent means no disrespect when he truthfully states that in the recent past some members of this Court may have, albiet unintentionally, relegated trial by jury to the position of being only a preliminary hearing body, a formal cerimonial prerequisite to the real and actual trial which may take place in the appellate-courts-of-the-future. ROSE V. CLARK, supra.

Because the facts of respondent's case show both actual innocence and at best a degree of responsibility, to be set on retrial by jury, at the level of manslaughter, unless a truthful self-defense defense correctly results in acquittal, this Court probably would have to overrule or modify at least one (if not more) of its' recent precidential decisions if certiorari was granted. ROSE V. CLARK, supra.

Reading some of the Court's more recent decisions does not reinforce the value of actual innocence or those values expressed in IN RE WINSHIP or MULLANEY V. WILBUR, nor do the recent decisions reflect those values in real life practice. Therefore, Petitioners' questions presented should not be granted review by certiorari. The decision below was correct and should remain correct.

IV. THE COURT'S RECENT TREND OF ONLY ACCEPTING CASES WHICH HAVE THE WORST POSSIBLE RECORD FACTS SUPPORT'S DENIAL OF CERTIORARI WHERE RESPONDENT'S CASE HAS THE BEST SET OF RECORD FACTS POSSIBLE IN A MALICE MURDER CASE

In SANDSTROM the defendant struck his wheelchair bound victim in the back of the head with a shovel prior to stabbing her five times with a knife, n.15 /. In JOHNSON the gang rapist threw his bound victim over a bridge into a river to freeze and drown. In KOEHLER V. ENGLE n. 16/ the defendant shot Regis Lantzy in a Detroit automobile plant, and confessed to his nightmarish image of his victim with blood gushing from his mouth. In FRANKLIN the escaped prisoner, after his hostage had broken free, shot and killed an innocent citizen in his dwelling house. In ROSE V. CLARK the defendant purportedly stalked his victim for an hour prior to shooting her (and her boyfriend) in front of her three and six year old children.

In MASSACHUSETTS V. REPOZA it was alleged that a young boy, who declined to use a small knife offensively prior to that time, stabbed once and ran, while fighting or struggling, or while pursued by the victims friends, or while the victim and his friend were on top of the defendant in a pile, or under the circumstances to be found by a jury, properly instructed on the law, upon the

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n.15 / U.S. Supreme Court Records & Brief's No. 78-5384.

n.16 / Aff'd by equally divided Court, 104 S.Ct. 1673 (1984), No. 83-1, B.N.A.'s Law Brief's Reprint, Vol. 15, no. 25.
Tilden N. Engle shot Lantzy who began to run. Engle shot again and Lantzy fell. Engle shot Lantzy twice more, stood over the body and then walked away (Petition for cert. p. 4) in KOEHLER V. ENGLE, No. 83-1 Oct. term,1983.

forthcomming retrial of your Respondent.

Notwithstanding the facts of this case concerning a dispute at a party in which uninvited guests were asked to leave, GREEN V. UNITED STATES , 405 F2d 1368,1370 (D.C. Cir. 1968) (Presumption of malice and intent required a new trial), this Court held in MULLANEY V. WILBUR, 421 U.S. 684, at 697-698 (1975) that WINSHIP's due process requirement of proof beyond a reasonable doubt was "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."(id); See also EVANS V. UNITED STATES, 277 F2d 354,356 (D.C. Cir. 1960)(Bazelon,J.).

REPOZA II created an "actual innocence" exception, limited presently to the Commonwealth of Massachusetts, for those few criminal defendants whose case specific facts and legal claims pass through the eye of the needle to defeat the law of the case doctrine.

Whether this Court should accept this case to draw a bright line for others to follow with similar strong claims of actual innocence, case specific facts, and strong legal claims, is a question the Pro Se respondent must leave to his faith and trust in the values of the individual justices of the Supreme Court of the United States.

For present purposes it is sufficient for this Court to recognize that the Massachusetts Supreme Judicial Court possesses these high values and is consistantly willing to stand behind them.

CONCLUSION

For the foregoing reasons your Respondent requests that the state of Massachusetts Petition for a writ of Certiorari be denied.

RESPECTFULLY SUBMITTED,

October 1st ,1987

RICHARD REPOZA PRO SE
P.O. Box 100 (MCI Cedar Junction)
South Walpole,MA.02071

On The Opposition Here;and on the Briefs in the Court Below,

Michael Kevin DuPont
(Prisoner) M.C.I. Cedar Junction
South Walpole,MA.

I, Richard Repoza Pro Se, hereby certify that today October 1st ,1987, Respondents' counsel[n.17] for the state of Massachusetts, Attorney General Shanon and A.A.G. Corbett, have been mailed 3 copies of respondents' opposition to their Petition for a writ of Certiorari, w/Appendix's C,D,and E.

RICHARD REPOZA PRO SE

n.17 A.A.G. Linda G. Katz, Counsel of Record,
/Attorney General's Office
One Ashburton Place
Boston,MA. 02202

APPENDIX "C"

MASSACHUSETTS APPEALS COURT
DECISION IN REPOZA II

to supreme court of the United States

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 84-1156

COMMONWEALTH

vs.

RICHARD REPOZA.

MEMORANDUM AND ORDER

On November 2, 1978, the defendant was convicted of murder in the second degree by a jury in the Superior Court. His conviction was affirmed on December 15, 1980, by the Supreme Judicial Court after plenary review under G. L. c. 278, § 33E, as amended through St. 1974, c. 457. Commonwealth v. Repoza, 382 Mass. 119 (1980). [1] On August 17, 1984, the defendant filed a pro se motion for release from unlawful restraint pursuant to Mass.R.Crim.P. 30(a), 378 Mass. 900 (1979). The motion was accompanied by the defendant's affidavit. In the motion, the defendant attacked his conviction on two grounds: first, that the trial judge's instructions were constitutionally defective because of the use of presumption language; and, second, that he was furnished with ineffective assistance by his trial

[1] The availability of review under G. L. c. 278, § 33E, for the defendant's second degree murder conviction is explained in Commonwealth v. Repoza, 382 Mass. at 120 n.1.

counsel. A judge of the Superior Court [2] examined the motion and affidavit. In a written "Memorandum and Order," the judge concluded, with respect to the jury instruction claim, "that the motion raises no substantial issue, even as supplemented by [d]efendant's affidavit." The judge then "decline[d], as a matter of discretion, to assign or appoint counsel . . . and . . . decided the matter [by denying the motion] without further hearing." The judge did not consider the second assertion in the motion, which was, as noted, that the defendant had been denied effective assistance of counsel. The defendant has appealed. [3]

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[2] The trial judge had retired by the time the motion was brought.

[3] The appeal is before us with a brief by a lawyer from the Committee for Public Counsel Services and a brief and reply brief by the defendant acting pro se. The defendant appeared pro se at the oral argument of the appeal. The defendant appears satisfied with the brief filed by the lawyer from the Committee for Public Counsel Services. Considerable effort was made (as detailed in the single justice file in the case) to provide the defendant with counsel to argue the appeal but the defendant rejected the lawyer who was assigned. The defendant was then directed to appear and argue the appeal himself.

As to other procedural points, we note, as explained in Commonwealth v. Adrey, 397 Mass. 751, 752 (1986), that "one convicted of murder in the second degree on an indictment charging murder in the first degree need not seek from a single justice of [the Supreme Judicial Court] leave to appeal the denial of a motion for new trial." Further, as this is the defendant's first motion for new trial, it would appear that the doctrine of waiver, as explained in Commonwealth v. Deeran, 397 Mass. 136 (1986), has no application to the motion.

1. Jury instructions. The defendant's challenge to the jury charge concerns three instructions. The first two instructions were given in connection with the judge's definition of the element of malice necessary to prove murder. As to this element, the trial judge told the jury that "when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought," and he later stated that "the circumstances which attend to killing [sic] may be shown to rebut the presumption." Subsequently, after his instructions on the crimes of voluntary and involuntary manslaughter, the trial judge gave the jury the following instruction: "Whenever a person intentionally sets in motion against another a force which, according to the common experience of mankind, is liable to kill and death does result, that person is deemed in law to have intended to kill."

The defendant argues that the first two instructions created a rebuttable presumption of malice, and that the third instruction created a conclusive presumption of intent to kill. He argues that the overall effect of the instructions was to shift the burden of proof to him on key mental elements of the crimes of murder and manslaughter in violation of due process. Relying upon the recent United States Supreme Court decision in Francis v.

Franklin, 105 S. Ct. 1965 (1985), the defendant contends that the remaining language of the charge did not sufficiently clarify the Commonwealth's burden in relation to the presumptions and that, as a result, a rational juror could not have ignored the improper language in reaching a verdict. [4]

The Francis decision is the latest in the line of decisions beginning with Sandstrom v. Montana, 442 U. S. 510 (1979), that deal with the question of improper, burden-shifting language in instructions to a jury in a criminal case. The language is usually cast in terms of the effect of evidentiary presumptions (as distinguished from constitutionally acceptable language explaining the jury's right to draw inferences, see Ulster County Court v. Allen, 442 U.S. 140, 157-163 [1979]), and often appears in the definition of the element of the various crimes of homicide which require proof of malice or an intent to kill. [5] Typically, the instructions

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[4] In this regard, the defendant refers specifically to the statement in the Francis decision, 105 S. Ct. at 1975, that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."

[5] In Sandstrom the improper instruction was that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." Some other decisions of the United States Supreme Court involving the problem are Connecticut v. Johnson, 460 U.S. 73 (1983), in which the jury had been instructed that "a person's intention may be inferred

defendant's counsel, assiduously brought to the judge's attention perceived Sandstrom defects. In the days when these charges were given, however, such prompting was usually not done because criminal lawyers were not clairvoyant.) The language in Francis, that adequate explanation is necessary, simply restates, in different terms, the principle of Sandstrom that the charge, considered as a whole, must convey to a reasonable juror the correct burden of persuasion. See Francis v. Franklin, 105 S. Ct. at 1973.

As we see it, the essence of the problem lies in distinguishing the goal of the prosecution's proof from the means used to achieve that goal. The goal is the requirement that the Commonwealth establish a defendant's guilt on each element of the crime charged by proof which persuades the jury to find its existence beyond a reasonable doubt. The means to that goal is the evaluation of the evidence by the jury in accordance with the judge's instructions (i.e., the way in which the jurors, as instructed by the judge, assign qualitative weight to the Commonwealth's proof). That proof should not be aided by an artificial evidentiary presumption which may have the effect of excusing the Commonwealth entirely from proving an essential element of the

crime or of requiring the defendant to disprove the element. [5] The inherent harm of such instructions is explained in the Francis decision (at 1974) in the following terms:

> "As we explained in Sandstrom, general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not 'rhetorically inconsistent with a conclusive or burden shifting presumption,' because '[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.' 442 U.S. at 518-519 n.7."

Thus, if the proof has been aided by an improper instruction which invokes the aid of a presumption, then there must be sufficient language elsewhere in the charge, including the general instructions on burden of proof (which, however, may not alone suffice, see Francis v. Franklin, 105 S.Ct. at 1974), to ensure that a reasonable juror could not have misconstrued the correct nature of the burden of persuasion.

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[6] An example was given in the Francis case (at 1974) as follows:

> "In light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise."

See also Sandstrom v. Montana, 442 U.S. at 522; Connecticut v. Johnson, 460 U.S. at 85.

Solving the problem may appear easy in the abstract, but it has proven difficult in the concrete. The aftermath of Sandstrom has been considerable disagreement in lower appellate courts over critical semantic issues -- some courts concluding that the use of the word "presume" is absolutely forbidden, others concluding that it is not; some courts finding the use of the word "infer" proper, some concluding it is not; and other courts disagreeing over the effect to be given to qualifying language in the instructions that might tend to negate the effect of improper language. [7] The perplexing problem in all the cases lies in ascertaining how much correct or clarifying language is sufficient to dispel the taint of a constitutionally infirm instruction.

The Supreme Judicial Court views the approach necessary under Sandstrom in these cases in the following terms: "We must consider the instruction

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[7] A relevant general discussion of these issues and the decisions which have followed in the aftermath of Sandstrom appears in Allen & DeGrazia, "The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts," 20 Am. Crim. L. Rev. 1 (1982). At pages 23-25, the authors survey the "linguistic difficulties plaguing the lower courts," and in the footnotes at these pages (nn. 150-162) set forth many lower State and Federal court decisions decided since Sandstrom which disagree over the application of that decision.

in question in the context in which it was delivered, in order that we might determine its probable effect on the jury's understanding of their function." Commonwealth v. Adrey, 397 Mass. 751, 753-754 (1986), and cases cited. If "the instructions as a whole, despite the unfortunate use of presumption language, reasonably could not have misled the jury to understand that the Commonwealth was relieved of its burden of proving every essential element of the crime charged," the instructions are constitutionally adequate. Id. at 755. It is obvious from these statements that the Supreme Judicial Court: (1) does not consider improper language evoking a presumption as creating reversible error per se, and (2) looks to the charge as a whole in deciding whether any improper language would have the effect of shifting the burden of proof in the mind of a reasonable juror. Such an approach appears to follow the precepts of Sandstrom, as explained by the Francis decision.

Coming to terms with this appeal, we agree with the defendant's analysis that the first two instructions, given in connection with the definition of malice, tended to create a rebuttable presumption of malice. The difficulty from our standpoint as an intermediate appellate court is that, in essence, the defendant's present contentions as to these

instructions have already been reviewed by the Supreme Judicial Court on his direct appeal pursuant to that Court's power under G. L. c. 278, § 33E. See 382 Mass. at 132-135. That review was conducted in light of Sandstrom, which had been decided at the time of the direct appeal. See 382 Mass. at 134. After review under § 33E, the Supreme Judicial Court concluded that this aspect of the charge, in light of the charge as a whole, "left no doubt that the jury could return a verdict of murder only if they were satisfied of the existence of malice beyond a reasonable doubt." 382 Mass. at 134. The defendant's present attempt to circumvent this conclusion depends primarily on the assumption that the Francis case has changed the law in some new and dramatic way. As suggested above, however, we can discern in Francis no such changes, rather only an explanation of the principles set forth in Sandstrom.[8] We conclude that fresh review of the effect of these instructions is foreclosed to this court by the Supreme Judicial Court's decision of the defendant's direct appeal.

[8] The majority opinion in Francis rejects as "simply inaccurate" the "suggestion that [the] holding [in Francis] with respect to the constitutionality of mandatory rebuttable presumptions 'extends' prior law." Francis v. Franklin, 105 S. Ct. at 1973 n.5.

We agree with the defendant that the third instruction (a person who voluntarily sets in motion a deadly force which causes death is "deemed in law to have intended to kill") tended to create a conclusive presumption. The effect of this instruction was not explicitly considered by the Supreme Judicial Court in the defendant's direct appeal. As review pursuant to G. L. c. 278, § 33E, is broad and exhaustive, see Commonwealth v. Baker, 346 Mass. 107, 109 (1963); Commonwealth v. Smith, 357 Mass. 168, 181 (1970), we may be able to assume that the Supreme Judicial Court examined the language and concluded that it could not have shifted the burden of proof in violation of Sandstrom. Such a conclusion could have been based either on the premise that other language in the instructions eliminated any chance that a reasonable juror could confuse and misapply the burden of proof, or on the premise that the instruction applied only to the crime of involuntary manslaughter, not to the element of malice in murder, and as such expressed, despite the unfortunate choice of words, the correct principles of that crime as set forth in cases such as Commonwealth v. Santo, 375 Mass. 299, 306 (1978), and Commonwealth v. Evans, 390 Mass. 144, 152

(1983). [9] On the other hand, this instruction simply may not have been directly focused upon by the Supreme Judicial Court in its examination of the Sandstrom question. This conclusion appears unlikely in view of the thorough nature of the original decision's analysis of the Sandstrom issue.

We find the instruction troublesome. Although following upon instructions on the law of manslaughter, it is somewhat freefloating. It could easily have been interpreted by the jury to apply to the element of malice necessary to convict of murder and to subvert the burden of persuasion on that element by means of its conclusive effect. See Francis v. Franklin, 105 S. Ct. at 1974. "Rather than evaluating the evidence to determine if the [Commonwealth] had overcome the presumption of innocence and proved beyond a reasonable doubt that the defendant had intended to kill, the jurors might have believed that, upon finding certain preliminary facts, 'they were directed to find against defendant on the element of intent.'" Connecticut v. Johnson, 460 U.S. at 84 (citation omitted). The mandatory character of the language may have been reinforced by the language of yet another presumption that

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[9] The instruction was given at the conclusion of the judge's charge on the elements of the two kinds of manslaughter.

immediately preceded it. (Just prior to giving the instruction under discussion, the judge had stated, "Even if [the defendant] only intended to wound, in law he is presumed to have intended to kill.") [10] The language may also have effectively foreclosed the jury's consideration of voluntary manslaughter as an alternative by being understood to eliminate any form of manslaughter if the jury found that the defendant had used a deadly weapon. [11] In view of the nature

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[10] In considering, as we must, the charge as a whole, we note that the judge had earlier emphasized as binding upon the jury his instructions of the law. He stated:

> "Therefore, the only part of my charge by which you are bound, and by which you are required to apply, are my instructions on the law as it is applied to the facts of this case. I shall make no attempt to instruct you on how you should find the facts in this case.
>
> "However, you must apply the law, whether you agree with it or not, whether you like it or not. It is not open to a jury to make its own law. That is my function."

The jury could have thought that, in order to obey the judge's instructions, they were required to apply the presumptions that the judge chose to present as the law's own. The jury could have thus concluded that this required the introduction of presumptions dictated by the law into their deliberations and that the presumptions sufficed as proof beyond a resonable doubt with respect to the elements in question. See Connecticut v. Johnson, 460 U.S. at 85.

[11] In this respect, it could probably not be argued that the instruction was harmless beyond a reasonable doubt in view of the second degree murder conviction. The jury could have arrived at the second degree conviction by reasoning that this

of the broad review under G. L. c. 278, § 33E, and the fact of the original decision in this case, we think that this question as well is one more properly reserved for consideration by the Supreme Judicial Court on an application for further appellate review. Cf. Burke v. Toothaker, 1 Mass. App. Ct. 234, 239 (1973). Accordingly, we conclude that the defendant's current attack on the instructions must be rejected at this level in its entirety.

2. Ineffective assistance of counsel. The Superior Court judge who denied the defendant's rule 30(a) motion, made no reference in his written decision to the defendant's claim of ineffective assistance of counsel. The defendant's appellate counsel does not argue the issue in his brief for the defendant. The defendant in his own brief argues three claims of ineffective assistance: (1) that his trial counsel took money from both the defendant's family and from the Commonwealth in prosecuting the direct appeal, thereby enmeshing himself in some type

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instruction eliminated a manslaughter verdict. The situation would be the reverse of the typical one in which a jury might reject the principal offense charged (for example, first degree murder) to convict of the lesser included offense (say second degree murder). In such a case, any error would likely be harmless. The situation in the present case might have resulted from the jury's coming to convict of the graver offense by determining that the law, as explained by the judge, precluded a finding of guilt of any lesser crime.

of conflict of interest; (2) that his trial counsel failed to "submit case law or supporting authorities for his own numerous objections on evidentiary matters, or to defend his position from the persistent repeated objections of the prosecutor"; (3) that his trial counsel acted incompetently in failing to object to the trial judge's use of the presumption language in the jury charge.

As to the first claim, there is nothing in the defendant's affidavit submitted with his rule 30(a) motion which supplied any basis for the facts underlying the claim. The defendant now attempts to raise the claim by means of a new affidavit signed by his mother. We decline to consider the affidavit since the issue, for whatever it may be worth, was not factually before the motion judge in the Superior Court.

The second claim fails for the same reason. There are no facts properly in the record upon which the issues involved in this claim can be decided on appeal.

As to the third claim, trial counsel should have called the presumption language to the trial judge's attention. As the decision of on the direct appeal notes, however, the deficiencies in the instructions were brought to the judge's attention by the prosecutor and intentionally rejected by the judge.

See 382 Mass. 135 at n.8. It thus can be said that the trial judge was made aware of the point that the defendant now presses on appeal and that the judge made an informed determination to reject it. As a result, we cannot say that the oversight of the defendant's trial counsel resulted in the loss of any right of the defendant. As has been explained in part 1 of this memorandum, the constitutional adequacy of the charge is at this point a question for the Supreme Judicial Court without regard to the actions of the defendant's trial counsel.

We see nothing in the defendant's other arguments which merits separate discussion.

Therefore, upon consideration of the appendices, briefs and oral argument it is ordered, pursuant to Rule 1:28 of this court, that the following entry be made on the docket of the Superior Court Department in this case:

Order denying motion for new trial affirmed.

By the Court (Greaney, C.J., Kaplan & Armstrong, JJ.),

Nancy Tuck Foley
Clerk

Entered: July 14, 1986.

APPENDIX "D"

ORIGINAL PLEADINGS AND SUPERIOR
COURT DECISION IN REPOZA II

Appendix D

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL NO. 78-3052

COMMONWEALTH OF MASSACHUSETTS

vs

RICHARD REPOZA

MOTION FOR RELEASE FROM UNLAWFUL RESTRAINT
Mass.R.Crim.P. 30(a)

The defendant, Richard Repoza, acting pro se, moves, pursuant to Mass. R. Crim.P., 30(a) that the Court order him released from unlawful restraint. The grounds for his motion are set out more fully in the attached affidavit of the defendant, which is hereby made part of this motion.

The defendant says that the Court's instruction(s) to the jury unconstitutionally shifted the burden of rpoof to the defendant in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The defendant further alleges that he was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

The defendant is presently without counsel and respectfully reserves the right to amend this motion once counsel is appointed to represent him.

WHEREFORE, the defendant prays that the Court:

1. appoint counsel to represent the defendant in the preparation and presentation of this motion.

2. hold a hearing at which time the defendant and counsel may appear and present arguments in support of this motion.

3. order that the defendant be discharged from custody or other restraint on his liberty.

IN THE OFFICE OF THE CLERK OF THE COURTS
AUG 17 19..

August 13, 1984

Respectfully submitted,

Richard Repoza

Richard Repoza, Pro se
P.O. Box 43
Norfolk, Massachusetts 02056

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Denied after consideration. See Memorandum and Order of even date. HBZ JSJ 9/17/84

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL NO. 78-3052

COMMONWEALTH OF MASSACHUSETTS

vs

RICHARD PEPOZA

AFFIDAVIT OF THE DEFENDANT REPOZA

The defendant Richard Repoza, according to law being duly sworn, deposes and says:

1. I make this Affidavit in support of my Motion For Release From Unlawful Restraint.

2. On November 2, 1978, I was found guilty of murder in the second degree on Middlesex Indictment 78-3052 after a trial by jury for first degree murder. Associate Justice Tamburello (now retired) presided. I was thereafter sentenced to life imprisonment.

3. I am presently incarcerated at M.C.I. Norfolk.

4. After the presentation of the Commonwealth and my defense, the Court instructed the jury on the element of malice required to support a murder conviction. The Court spoke twice of a "presumption" of malice arising from the intentional use of a deadly weapon in a homicide:

> "So what is malice as used in the words: malice aforethought? Well, it is of two kinds. It is active malice, which we all understand by the sumple use of the words in this meaning: an active malice is ill will towards someone. It is the active hatred of someone. It is a grudge or an ill feeling toward someone, harboring an attempt to hurt someone, or act of bad blood or feeling. Generating motives or revenge or punishment. That is active malice. But you are not looking for active malice alone. You are looking for an unlawful, unjustified act with no extenuating circumstances, and the wrongfulness of the act itself is sufficient to sustain a finding of malice so far as the law is concerned.
>
> "That is perhaps malice implied in law as distinct from that you find from the conduct of people. And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought. Because, as that term

> has long been understood and applied in this Commonwealth, the use of a deadly weapon, itself capable of causing harm and death, if an unjustified act with no extenuation or excuse, is sufficient itself to supply the element of malice you are looking for in determining whether a crime is murder or less than murder.
>
> "However, the circumstances which attend to killing may be shown to rebut the presumption by showing circumstances which, although they do not excuse the killing, might mitigate it from the crime of murder to manslaughter. And this I will discuss for you when I define manslaughter." (Emphasis supplied) Tr. T. 9-69-70, Exhibit "A."

5. This instruction unconstitutionally shifted the burden of proof from the prosecution to me and contributed greatly to my conviction.

6. My counsel, Paul F. Caradonna, failed to except to this portion of the trial court's instructions in spite of the fact that the United States Supreme Court had decided that these kinds of instructions to the jury were unconstitutional three years previous to my trial, Mullaney v. Wilbur, 421 U.S. 669, 95 S.Ct. 1881 (1975).

6. The Supreme Judicial Court, sua sponte, and pursuant to its powers under the provisions of G.L. chapter 278, section 33E, reviewed this error, Commonwealth v. Kelcza, ____Mass.____, 414 N.E.2d 591, at 600-601, found this instruction incorrect, but declaring the charge read as a whole would pass constitutional muster.

7. However, the United States Supreme Court, two years later in Connecticut v. Johnson, ____U.S.____, 103 S.Ct. 969 (1983), established a rule of automatic reversal because of the difficulty in determining the effect of a burden-shifting charge on a jury verdict, quoting from Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

8. Further, the trial court compounded the burden-shifting error in its instructions to the jury when he indicated:

> ". . . And it doesn't make any difference whether somebody intended to kill or not; because, as the law says, a person who intends to do grave bodily harm to another with a deadly weapon which would probably do grave bodily harm is liable even if he only intended to wound, in law he is presumed to kill.
>
> "Whenever a person intentionally sets in motion against another a force which, according to the common experience of mankind, is liable to kill, and death does result, that person is deemed in law to have intended to kill." (Emphasis supplied) Tr. t. 9-78, 9-79, Exhibit "B."

9. Again my counsel failed to take exception to this portion of the trial court's instruction.

10. The Supreme Judicial Court also failed to correct the unconstitutionality of this portion of the charge but they did not have the benefit of the "seldom, if ever" holding in Connecticut v. Johnson, supra.

11. The trial court clearly expressed to the jury that "intent" was a very necessary element of the offense for which I was charged and alluded to "intent" at least on 31 occasions.

12. Further, the trial court instructed the jury to accept the court's pronouncement of the law on at least six occasions. (Tr. T. 9-35, 36, 37, 38). Therefore, when the court instucted as he did in Exhibit "B", the jury was left with no alternative but to return a verdict of guilty against me.

13. My counsel failed to take exception to the trial court's unconstitutional instructions and such failure, cannot, under any circumstances, be attributed to trial strategy or tatics, but, simply put, such failure on his part fell far below the minimum standards required and expected of competent counsel in a criminal trial.

14. Because of the trial court's unconstitutional and burden-shifting instructions, my constitutional rights pursuant to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States was violated.

15. Further, because my counsel ineffectively represented me, my right to effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments of the United States Constitution was violated.

16. Because of the above, I am entitled to my release from unlawful restraint.

Signed under the penalties of perjury this 13th day of August, 1984.

Richard Repoza

Richard Repoza, Pro se
Affiant

intentionally and without legal justification, excuse, or extenuation, uses upon the body of another a force -- for example, a bullet from a revolver of large caliber -- which, as used, will probably do great bodily harm to that other person and would create a strong likelihood that the other will die, the act is malicious within the meaning of the law, even though the doer of that act was indifferent as to whether or not death would result, and even wished or hoped that death would not result. An unlawful killing may be with malice aforethought and murder in some cases, where there was no intention to endanger life or even to injure.

So what is malice as used in the words: malice aforethought? Well, it is of two kinds. It is active malice, which we all understand by the simple use of the words in this meaning: an active malice is ill will towards someone. It is the active hatred of someone. It is a grudge or an ill feeling toward someone, harboring an attempt to hurt someone, or act of bad blood or feeling, generating motives of revenge or punishment. That is active malice. But you are not looking for active malice alone. You are looking for an unlawful, unjustified act with no

extenuating circumstances, and the wrongfulness of the act itself is sufficient to sustain a finding of malice so far as the law is concerned.

That is perhaps malice implied in law as distinct from active malice that you find from the conduct of people. And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought. Because, as that term has long been understood and applied in this Commonwealth, the use of a deadly weapon, itself capable of causing harm and death, if an unjustified act with no extenuation or excuse, is sufficient itself to supply the element of malice you are looking for in determining whether a crime is murder or less than murder.

However, the circumstances which attend to killing may be shown to rebut the presumption by showing circumstances which, although they do not excuse the killing, might mitigate it from the crime of murder to manslaughter. And this I will discuss for you when I define manslaughter.

Now, understanding malice, what does aforethought mean? It means that wicked intent or purpose is distinctly present prior to the killing,

substantial harm would result to others.

Now, I have defined voluntary manslaughter and involuntary manslaughter. I do that because they are embraced within the basic indictment charging murder in the first degree. I say to you that in order to justify a finding of manslaughter, whether voluntary or involuntary, you must find from this evidence beyond a reasonable doubt that these killings occurred, under the circumstances that I indicate, and constitute the crime of manslaughter, voluntary or involuntary. And if you do not find them, you have no right to make a finding of manslaughter.

Manslaughter is not included in the crime of murder for the purpose of giving the jury a compromise verdict. If you honestly and conscientiously find a killing from the facts and the inferences and the circumstances which warrant you in believing that this was an unintentional killing caused by wanton and reckless and careless conduct, then it is open to you. And it doesn't make any difference whether somebody intended to kill or not; because, as the law says, a person who intends to do grave bodily harm to another with a weapon which would probably do grave bodily harm is liable. Even if he only intended

to wound, in law he is presumed to have intended to kill.

Whenever a person intentionally sets in motion against another a force which, according to the common experience of mankind, is liable to kill, and death does result, that person is deemed in law to have intended to kill.

I have defined for you the basic crimes. This is the whole spectrum of unlawful killings. There is no contention in this case that this killing was lawful.

Let's take a shorthand look at these various matters. Murder in the first degree. That is deliberately premeditated malice aforethought.

Murder in the second degree. We drop off the first two words, and you have malice aforethought.

Manslaughter, voluntary. A killing with sudden transport of passion or heat of blood upon reasonable provocation without malice or upon sudden combat.

Involuntary manslaughter. Unintentional, but caused by wanton and reckless conduct.

Now, if you find that the defendant committed an unlawful homicide, you will find him

CERTIFICATE OF SERVICE

I, Richard Repoza, the defendant herein, duly swear that o n the below date I mailed copies of the attached Motions to the Attorney General, One Ashburton Place, Boston, MA 02108 and the District Attorney, MIddlesex County, Cambridge Court House, East Cambridge, MA by certified mail, return receipt requested and pre-paid.

Richard Repoza

Richard Repoza, Pro se
P.O. Box 43
Norfolk, MA 02056

August 13, 1984.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT
CRIMINAL ACTION
NOS. 78-3052

COMMONWEALTH

v.

RICHARD REPOZA

MEMORANDUM AND ORDER

Defendant, acting pro se, has moved, pursuant to Mass.R.Crim.P. 30(a), for release from unlawful restraint. He argues that the trial judge, in instructing the jury, "spoke twice of a 'presumption' of malice arising from the intentional use of a deadly weapon in a homicide." Conceding that the Supreme Judicial Court has already reviewed this contention, and affirmed his conviction, Commonwealth v. Repoza, 382 Mass. 119 (1980), Defendant now maintains that a subsequent decision by the United States Supreme Court, Connecticut v. Johnson, U.S. , 103 S.Ct. 969 (1983), compels reversal.

In essence, defendant urges this Court to read the Johnson rule retroactively, and to conclude that, thus read, it mandates disregard of the Supreme Judicial Court's 1980 decision.

The essential language which the trial judge used is:

> And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought.

> However, the circumstances which attend to [sic] killing may be shown to rebut the presumption....
>
> A person who intends to do grave bodily harm to another with a weapon which would probably do grave bodily harm is liable. Even if he only intends to wound, in law he is presumed to kill.
>
> Whenever a person intentionally sets in motion against another a force which, according to the common experience of mankind, is liable to kill, and death does result, that person is deemed in law to have intended to kill.

The Supreme Judicial Court concluded that although these instructions were incorrect, the charge, read as a whole, was constitutionally adequate.

Johnson, Defendant argues, established a rule that such a charge could never pass constitutional muster. A reading of Johnson, however, refutes Defendant's contention. The trial court there twice told the jury that "every person is conclusively presumed to intend the natural and necessary consequences of his act," Connecticut v. Johnson, supra, at 973 and note (emphasis supplied). In determining the impropriety of the questioned language, the Supreme Court repeatedly and explicitly emphasized the Judge's use of the words "conclusive presumption."

The word "conclusive", in the context of a jury charge, imposes a restraint on free consideration that the word "presumption", standing alone (as in the instant case) does not.

A conclusive presumption, as the United States Supreme Court noted, "eases the jury's task," and leaves it of "'the more difficult task' of evaluating the evidence of intent," Connecticut v. Johnson, supra, at , 976.

The Massachusetts judge, however, as the Supreme Judicial Court noted Commonwealth v. Reposa, supra at 134, gave "repeated and careful instruction reinforcing the principle that the burden of proof of every essential element of the crime invariably remains with the Commonwealth," and thus sharpened the blurred distinction between inference and presumption.

Thus, whether or not the rule in Connecticut v. Johnson, supra, is retroactive, the present motion must fail because even in the light of that rule, the instant jury instructions were constitutional.

Because it appears that the motion raises no substantial issue, even as supplemented by Defendant's affidavit, I decline, as a matter of discretion, to assign or appoint counsel, Mass.R.Crim.P. 30(c)(5), and I decide the matter without further hearing, Mass.R.Crim.P.30(c)(3)

ORDER

Accordingly, it is ordered that defendant's Motion for Release From Unlawful Restraint be, and the same hereby is, Denied.

53

FILED
IN THE OFFICE OF THE
CLERK OF THE
SEP 17 1984

Hiller B. Zobel
Justice of the Superior Court

Dated: September 17, 1984

-12-

APPENDIX "E"

SUPREME JUDICIAL COURT
DOCKET ENTRIES
(Showing SJC had Trial Transcript to review)

COMMONWEALTH vs. RICHARD REPOZA

A.C. No. 84-1156
Order: FAR-4006
Date: 10-3-86

Trial Court: Middlesex Superior

No. 78-3052

Nature of Case: Murder II

Appeal by: Defendant

Exhibits:

Transcripts: 10 vols., 2 sets

Argued: March 2, 1987
Submitted:
Quorum: H L N Ly O W A *
(N dissenting)

Decided: July 23, 1987

Reb'g. No. Date:
Allowed/Denied Date:

Miscellaneous:

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141 Tremont Street
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1	10-10-86.	ENTERED.

COMMONWEALTH vs. RICHARD REPOZA

2	10-10-86.	MOTION of defendant to file Supplemental Brief: ALLOWED. Notice to counsel and pro se defendant.
3	10/13/86.	ORDER of Reference to Single Justice re issue of appointment of counsel. Notice to counsel and pro se defendant.
4	11-21-86.	MOTION of defendant/appellant (pro se) to extend time to file supplemental brief to Nov. 24: ALLOWED.
5	11-25-86.	SERVICE of pro se brief and separate Supplemental Appendix for defendant/appellant filed by Richard Repoza.
6	12-9-86.	SERVICE of Brief for the Commonwealth/appellee by Fern L. Nesson, A.D.A.
7	1-5-87.	SERVICE of Reply Brief for defendant/appellant filed by Richard Repoza, pro se.
8	1-2-87.	MOTION to file reply brief late: ALLOWED.
9	6-18-87.	SUPPLEMENTAL CITATIONS filed by defendant (pro se). Circulated to quorum.
—	7/23/87	WAIVER OF 130-DAY RULE. Notice to counsel.
10	7/23/87	SUPPLEMENTAL AUTHORITIES filed by defendant (pro se). (Not circulated; see Rescript this date.)
11	7/23/87	RESCRIPT JULY 23, 1987. We reverse the order denying the defendant's motion and remand the matter to the Superior Court for a new trial. Reasons as on file. Notice to counsel.
--	8/18/87	MOTION TO STAY ISSUANCE OF RESCRIPT filed by Commonwealth. (See entry at 9-14-87)
12	8-20-87	APPEARANCE filed for defendant by Bernard Grossberg.
—	9-3-87	MOTION of defendant for Stay of Sentence and Bail Pending Disposition of Commonwealth's Petition for Writ of Certiorari to the Supreme Court and Retrial, filed by Atty. Grossberg.
13	9-9-87	ORDER: "The Motion of the Commonwealth to Stay Issuance of Rescript and the defendant's Motion for Stay of Sentence and Bail Pending Disposition of Commonwealth's Petition for Writ of Certiorari to the Supreme Court and Retrial are referred to the Single Justice for recommendation to the Full Court." By the Court. Notice to counsel.
14	9-14-87	ALLOWANCE of Commonwealth's Motion to Stay Issuance of Rescript (filed Aug. 18, 1987). Notice to counsel.
15	9-16-87	ORDER: "Upon recommendation of the Single Justice the defendant's Motion to Stay Sentence and Admit to Bail is remanded to the Superior Court Department for determination in accordance with G.L. c. 211, §4A." By the Court.